Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

ROBERT MIMS,

Petitioner,

v.

DAVID CRIST, WARDEN; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the trial court's decision to preclude witness testimony concerning the suggestive nature of the identifications and their circumstances unconstitutionally denied Petitioner his due process right to a fundamentally fair trial?

(2) Whether the trial court unconstitutionally conditioned the admission of a critical government witness' mis-identification of Petitioner on the admission of the witness' later suggestive identification?

(3) Whether the Petitioner's constitutional rights were violated when the court permitted the prosecutor to tell the jury that the witness' mis-identification was due to a defense strategy to stack the line up with "clones" of Petitioner?

(4) Whether the prosecutor's misconduct during the course of the trial, which created a racially-charged atmosphere, violated Petitioner's due process rights?

(5) Whether Petitioner's counsel failure to object to the prosecutor's misconduct and the court's excessive judicial activism constituted ineffective assistance of counsel in violation of Petitioner's constitutional rights?

LIST OF PARTIES

Petitioner is Robert Mims, appellant below. Respondents are David Crist, Warden; the District Attorney of the County of Philadelphia; and the Attorney General of the State of Pennsylvania.

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Robert Mims ("Mr. Mims"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The March 5, 2003, Order denying Petitioner's Petition for Rehearing *en banc* was unreported and is reproduced in Appendix D. Petitioner's request for a certificate of appealability was denied by United States Court of Appeals for the Third Circuit on November 22, 2002, and is reproduced in Appendix A. Petitioner's Petition for Writ of Habeas Corpus was denied, and the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi was approved and adopted by the United States District Court for the Eastern District of Pennsylvania on July 26, 2001. The Order is reproduced in Appendix B. Finally, United States Magistrate Judge Peter B. Scuderi's Report and Recommendation to Deny Petition for Writ of Habeas Corpus filed April 16, 2001, is reproduced in Appendix C.

STATEMENT OF JURISDICTION

This is an appeal from the denial of a petition for a certificate of appealability of the United States Courts of Appeal for the Third Circuit under 28 U.S.C. § 2253. Petitioner applied for the certificate of appealability in order to appeal a final District Court order denying habeas corpus relief with respect to his state conviction. This Court has jurisdiction over this petition pursuant to 28 U.S.C. §§ 1254(1), 2241 and 2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the XIV Amendment to the United States Constitution provides:

> [a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

> of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment XIV.

Amendment V to the United States Constitution reads, in pertinent part,

> [n]o person . . . shall be de . . . deprived of life, liberty, or property, without due process of law. . . .

United States Constitutions, Amendment V.

Amendment VI to the United States Constitution reads, in pertinent part,

> [i]n all criminal prosecutors, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitutions, Amendment VI.

STATEMENT OF THE CASE

A. Introduction and Summary

On January 4, 1971, eight African-American men entered Dubrow's furniture store in Philadelphia, committed robbery and arson, and killed one man. The murder victim was African-American, and all of the remaining of the witnesses were white. Two days after the incident, two witnesses — Louis Gruby and Audrey DiMeo — allegedly identified a photograph of Petitioner, an African-American man, in a police photo array; the alleged identification occurred without defense counsel, and

the photo array was never produced at trial. The remaining ten witnesses never identified Petitioner in any way.

The only evidence linking Petitioner to this crime was the two witnesses' alleged photo array identification and their deeply flawed in-court identifications, discussed below. Petitioner had never met the victim and had no relationship to the furniture store. There was no hair or fiber evidence, no fingerprints or DNA, no telephone records or wiretaps, no security cameras or videotapes, no confession, no testimony by a coconspirator, no stolen property found in Petitioner's possession, and no allegations of Petitioner's involvement by an informant. In fact, Petitioner produced alibi evidence that he had moved to Chicago and was living there at the time the crime was committed.

Petitioner has always maintained his innocence.

Petitioner was convicted in April 1975 in a jury trial. On appeal, the conviction was reversed by the Pennsylvania Supreme Court based upon trial counsel's ineffective assistance. Petitioner was retried in 1981 with a codefendant, Edward Sistrunk. On November 19, 1981, Petitioner and his codefendant were convicted. Petitioner appealed to the Superior Court and the appeal was denied on December 14, 1984. On September 30, 1985, Petitioner's appeal to the Pennsylvania Supreme Court was denied. On January 11, 1996, Petitioner filed his first counseled post-conviction petition. After a hearing, the court denied relief without issuing an opinion.

The Pennsylvania Superior Court denied Petitioner's appeal of the denial of post-conviction relief on January 25, 1999. On September 23, 1999, the Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal. Petitioner filed his federal habeas petition on May 22, 2000. A Magistrate Judge issued findings and recommendations that were adopted by the District Judge. Petitioner then applied to the United States Court of Appeals for the Third Circuit, which denied his application for a certificate of appealability. Thereafter, the Petitioner applied

for a rehearing *en banc* to the United States Court of Appeals for the Third Circuit. That petition also was denied.

B. The First Trial

Mr. Mims was tried before a jury in April, 1975. The sole issue at trial was identity. DiMeo and Gruby identified Petitioner as one of the participants; however, both witnesses' identifications were profoundly suspect. First, during the trial and despite a sequestration order, DiMeo, accompanied by a detective, saw Petitioner in the hallway. Petitioner's counsel, Barry Denker, saw the detective point to Petitioner, who was in a group of men, and say to DiMeo, "that's the one." N.T. 4/15/75, 2, 3, 13, 14.[1] Denker immediately reported the incident to the trial judge. The judge questioned DiMeo and the detective, who denied pointing Petitioner out. The judge ruled that the Commonwealth had violated the sequestration order and noted that DiMeo and the detective contradicted each other in their testimony about the encounter in many respects. N.T. 4/16/75, 246. The judge further ruled that Denker could testify as a witness to the suggestive hallway encounter at trial if DiMeo made an in-court identification. N.T. 4/15/75, 19; 4/16/75, 246. The prosecutor, therefore, decided not to attempt to elicit an in-court identification from DiMeo. N.T. 4/16/75, 249-257. Instead, DiMeo testified only as to her alleged photo array identification.

Next, the Commonwealth called Gruby to testify. Gruby, who had not seen the perpetrator since the incident, testified about his alleged photo array identification and then was asked if he saw the man in the courtroom. He responded positively, identifying a spectator, Michael O'Connor. NT. 17.65-.70, 17.78-.79, 17.82,17.88 (11/13/81).

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1. Transcripts from the state court proceedings are denoted "Notes of Testimony" and are cited as "N.T." followed by the date and the page number.

(O'Connor, another African-American man, was ten years older than Petitioner, five inches shorter, and looked nothing like Petitioner (Photographs admitted at PCRA hearing — P-1, photo of O'Connor and P-2-4, photos of Petitioner). The trial judge then intervened, telling Gruby that he had been "hurried" in his identification, asking him to look again, and asking everyone in the first two rows to stand up. Gruby then decided he had made a mistake and identified Petitioner. He explained his initial identification of O'Connor by noting that "there is similarity in people." N.T. 17.78-.79 (11/13/81).

There was no other testimony or evidence linking Petitioner to the crime. Petitioner was convicted of murder and arson and sentenced to life imprisonment.

The Pennsylvania Supreme Court reversed. The Court held that trial counsel had been ineffective for failing to object to the trial judge's improper questioning of a critical identification Commonwealth witness, Louis Gruby, and to the unduly suggestive identification of petitioner by Gruby that resulted. *Commonwealth v. Mims*, 392 A.2d 1290 (Pa. 1978).[2]

C. The Second Trial

Petitioner was retried in 1981 with a codefendant, Edward Sistrunk. Judge Sabo presided over the second jury trial. During jury selection, the prosecutor intentionally removed all African Americans from the jury; she exercised thirteen (13) peremptories, striking each and every African American, resulting in an all-white jury. In fact, the United States District

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2. Petitioner's motion to dismiss the charges on double jeopardy and due process grounds was denied on April 4, 1979, and affirmed by *per curiam* order of the Pennsylvania Supreme Court. *Commonwealth v. Mims*, 414 A.2d 350 (Pa. 1980). An application for federal habeas corpus relief to bar a second trial was also denied. (CA. 80-2832 (E.D. Pa. 1980)). A motion to suppress the identification testimony of DiMeo and Gruby was denied on March 14, 1979.

Court for the Eastern District of Pennsylvania so found when it granted Sistrunk's habeas petition.[3]

At trial, over defense objection, the trial judge ruled that DiMeo would be permitted to make an in-court identification of Petitioner for the first time, ten years after the incident, but Petitioner would *not* be permitted to present the testimony of Denker that DiMeo had been coached in her identification prior to the first trial.

Additionally, the Commonwealth's only other identification witness, Gruby, had died between the trials. At the second trial, the Commonwealth introduced selected portions of Gruby's testimony from the first trial, including his testimony concerning a photographic identification of Petitioner. *See* N.T. 9.169-9.216 (10/29/81). What the Commonwealth did *not* introduce was the portion of Gruby's trial testimony in which he identified Michael O'Connor as the perpetrator. When the defense sought to introduce that testimony, the trial judge ruled that it could only be admitted if the subsequent identification of Petitioner by Gruby at that trial — the very identification that had led to the reversal of Petitioner's first conviction — was also admitted.

When Petitioner pointed out that the subsequent identification was found unduly suggestive by the state supreme

3. Chief Magistrate Judge Richard A. Powers III, in an opinion adopted by U.S. District Judge Marvin Katz on September 5, 1995, unequivocally found on August 10, 1995, that petitioner's prosecutor deliberately used her peremptory challenges to strike all 13 Black and one Hispanic to successfully achieve her goal of having petitioner and his co-defendant, Edward Sistrunk, tried by an all white jury. *Sistrunk v. Vaughn*, 754 F. Supp. 447 (E.D. Pa. 1991). This finding was not disturbed or criticized by the Third Circuit when it reversed Sistrunk's grant of habeas relief on the grounds that "the district court was foreclosed from addressing Sistrunk's *Batson* claims, as are we," because Sistrunk failed to raise his *Batson* claims on his post-conviction appeal and because Sistrunk did not prove that his post-conviction appellate counsel's decision not to raise the issue on appeal was ineffective assistance. *Sistrunk v. Vaughn*, 96 F.3d 666, 673-74 (3d Cir. 1996).

court and was the basis for overruling his first conviction, the judge ruled that the testimony could be admitted, with the substitution of the prosecutor's name for the judge's in the transcript. The trial judged concluded that the substitution cured any harm in admitting the prior Gruby identification of Petitioner. Nor would the judge permit O'Connor himself to testify about the identification, concluding that the transcript — which was utterly silent as to O'Connor's appearance and dissimilarity to Petitioner — could speak for itself. App. 32a. Over objection, the defense accepted the arrangement rather than forego admitting the vital defense evidence of Gruby's identification of another individual.

The second trial of Petitioner was rife with the sort of prosecutorial misconduct reminiscent of the deep South during the segregation era. Perhaps the most blatant and egregious examples occurred when the prosecutor questioned Petitioner's alibi witnesses, all of whom, like Petitioner, were African-American and members of the Nation of Islam. The prosecutor repeatedly mocked and belittled established Black Muslim religious traditions in an attempt to portray them as illegitimate, deceptive, and even criminal.[4] For example, she equated the

4. *See* N.T.12.64-65 (prosecutor's questions of witness Lt. Clark regarding Black Muslim "garb" worn by women at one of the locations police allegedly went to find petitioner after date of crimes); N.T.12.65 (prosecutor's questions to witness as to whether black "Moslem (sic) garb" was hooded and covered a part of the body); N.T.13.74 (prosecutor's deliberate negative reference to Black Muslim defense witness Jeremiah Shabazz's previous use of an "Anglo-American" name); N.T.13.76; 13.98 (prosecutor's deliberate and repeated practice of first referring to witness Shabazz as "Mr. Pugh" and then "correcting herself" by calling him by his Black Muslim name "Mr. Shabazz"); N.T.13.83 (prosecutor's reference to witness Shabazz's Black Muslim religious counsel to petitioner); N.T.13.84 (prosecutor's suggestive questions to Black Muslim defense witness as to whether Chicago Black Muslim temple destroyed records in response to police investigation); N.T.13.88 (prosecutor's negative reference to Ronald Boelter, who was

(Cont'd)

(Cont'd)
convicted for the crimes arising from the Dubrow Furniture Store incident in a prior separate trial, as someone who "stands around on the street corners . . . sell[ing] the 'Muhammad Speaks,'" a well-known Black Muslim newspaper); N.T.13.95 (prosecutor's deliberate reference to Shabazz as petitioner's Black Muslim "brother"); N.T.13.133 (prosecutor's negative reference to black defense witness Hamid Abduh's name change from Christian to Black Muslim); N.T.13.136 (prosecutor's negative characterization of the change in religious leadership at the Chicago Black Muslim temple as a "takeover"); N.T.13.137 (prosecutor's repeated characterization of Black Muslim leadership change as a "takeover"); N.T.13.138 (prosecutor's negative reference to Black Muslim defense witness Abduh's prior name Lassiter); N.T.13.157 (prosecutor's negative reference to Black Muslim defense witness' change to an Muslim name); N.T.13.179 (prosecutor's suggestion that police repeatedly came to Black Muslim defense witness Schuler's house to arrest him); N.T.14.47 (prosecutor's questions of Black Muslim defense witness Omar Karim about his name change); N.T.14.65 (prosecutor's questions Black Muslim defense witness Portia Pasha about her name change); N.T.14.152 (prosecutor's questions of Black Muslim defense witness Abass Rassoull concerning name change); N.T.18.112 (prosecutor's questions of Black Muslim defense witness suggesting that police had difficulty obtaining entry into a Black Muslim mosque); N.T.18.113 (prosecutor's questions concerning FBI's discussion with the mosque regarding its security arrangements); N.T.18.121 (prosecutor's questions concerning photograph of petitioner on mosque steps); N.T.18.156 (prosecutor's question to detective concerning whether Black Muslim co-defendant Sistrunk discussed his Black Muslim religious beliefs); N.T.19.6 (prosecutor's question to Mr. Shabazz whether the Black Muslim mosque kept congregation to a minimum because of exposure to law enforcement); N.T.19.7 (prosecutor's question to Black Muslim defense witness implying that Black Muslim mosque was being harassed by police because it was hiding fugitives); N.T.19.35 (characterizing in closing argument the alleged eight Black Muslim perpetrators as a "gang"); N.T.19.176 (arguing in closing argument that the murder victim was "happy" with his Anglo-American name).

Black Muslim religious practice of adopting Muslim names to that of criminals changing their names to conceal their identity and evade detection by law enforcement.[5]

In one particularly belittling exchange, the prosecutor (who well knew that Black Muslims refer to their former Christian names as "slave names") relentlessly harassed defense witness Abass Rassoull for his adoption of a Muslim name:

> Q [MS. CHRISTIE]: All right, Mr. Rassoull, your Anglo-American name, is that either Ed Clarence, or Clarence Benjamin Byrd, B-Y-R-D?
>
> A [MR. RASSOULL]: My name is — my slave name is Clarence Benjamin Byrd, correct.
>
> Q: Your slave name is Clarence Benjamin Byrd?
>
> A: The name you asked about — are you speaking of the name that was mine before I received the name Abass Rassoull?
>
> Q: I am speaking of your Anglo-American name, the name you received at birth form your non-slave parents, I assume?
>
> A: They were slaves mentally.
>
> Q: Your parents were slaves mentally?
>
> A: Mentally, yes. The name was Byrd.
>
> Q: I see. With regard to your parents, Mr. Byrd, Mr. Byrd and Mrs. Byrd, your mother and father —

---

5. The long-standing Muslim practice of adopting an Muslim name by those who follow the mandates of the Qur'an and the teachings of the prophet Muhammud is an act of ridding oneself of a name historically used to identify a slave as the property of a slave master and is also an act of defining one's spiritual aspiration and connection to God.

A: Yes.

Q: Are you telling this jury that your mother and father were slaves?

A: Mentally, yes, ma'am.

Q: Mentally they were slaves?

A: Yes, ma'am.

Q: I guess the same would apply to Dr. Martin Luther King?

A: Yes, ma'am.

Q: Thomas Bradley?

A: Yes, ma'am.

Q: Andrew Young of the United Nations?

A: Yes, ma'am.

N.T. 14.152-153.

This outrageous and offensive line of questioning served no legitimate purpose whatsoever — it was simply an excuse to denigrate the witness and the Petitioner for their religious beliefs, which stood in stark contrast to those of the white jurors.

The prosecutor continued to mock Petitioner's religion when she emphasized repeatedly in closing arguments that the African-American murder victim and his wife were perfectly happy with the names their parents gave them. App. 59a. Again, her remarks did not advance any legitimate prosecution or theory. Instead, they were simply gratuitous appeals to the white jurors' racial and religious bigotry.

The prosecutor also patently attempted to fabricate testimony by the defense witness that Muslims do not believe

in following "the law" in her misunderstanding of the witness' use of the word "Allah":

> Q [MS. CHRISTIE]: Did I understand you to say that the members of the Nation of Islam must be believers in the law? Is that what your testimony was, Mr. Rassoull?
>
> A: No, I said Allah.
>
> Q: Allah?
>
> A: Allah.
>
> Q: Then they don't have to be believers in the law?
>
> A: You asked me —
>
> MR. LIPSCHITZ: I object, if your Honor, please. Just a moment.
>
> MS. CHRISTIE: I will withdraw the question, your Honor.

(N.T.14.162). The point was made.

Quite apart from her outrageous appeals to prejudice, the prosecutor's closing arguments featured a virtual checklist of constitutional error. The prosecutor criticized Petitioner for waiving his preliminary hearing and claimed it was a defense trick to avoid confrontation with identification witnesses (App. 51a), told the jury that the presumption of innocence is not for the guilty and urged them not to apply it to Petitioner (App. 53a-54a), argued that Petitioner put on a defense case only because the government's case was so strong (App. 52a-53a), and stated — falsely and without a shred of evidentiary support — that Gruby identified someone other than Petitioner only because Petitioner had purposely filled the courtroom with "clones" in an effort to fool Gruby (App. 55a-58a).

On November 19, 1981, Petitioner and his codefendant were convicted of first-degree murder and other charges. Post-verdict motions were denied, and on October 31, 1982, Judge Sabo sentenced Petitioner to life imprisonment on the murder charge and a consecutive sentence of 10-20 years imprisonment on arson and aggravated robbery charges. A timely direct appeal to the Superior Court was denied in an unreported memorandum opinion and order on December 14, 1984 (*Commonwealth v. Mims*, 490 A.2d 12 (Pa. Super. 1984)), and on September 30, 1985 the Pennsylvania Supreme Court denied a timely-filed petition for an allowance of appeal. At the second trial and for all direct appeal proceedings Petitioner was represented by the now-deceased Louis Lipschitz.[6]

In 1987 petitioner filed a petition in Philadelphia Common Pleas Court requesting post-conviction relief and the appointment of counsel. No action was taken by the court. On January 11, 1996, the first counseled post-conviction Pennsylvania Post Conviction Relief Act petition was filed by Leonard Sosnov, who also represented Mr. Mims on his appeal to the Superior Court and in the District Court. On February 3, 1997, a hearing was conducted before Judge Sabo, in which affidavits and other evidence of Petitioner were all admitted by stipulation. N.T. 2/3/97, 6-18. On June 26, 1997, Judge Sabo denied relief in an order with no accompanying opinion.

6. Edward Sistrunk was also sentenced to life imprisonment, as was a third defendant Ronald Becker, who was tried separately. Sistrunk was denied relief on appeal in the Pennsylvania courts; he was subsequently granted habeas corpus relief by a district court on a finding of a Batson (*Batson v. Kentucky*, 471 U.S. 1052), equal protection violation and counsel's ineffectiveness for failing to preserve the claim on appeal. The Third Circuit reversed, holding, without deciding the merits of the *Batson* claim, that counsel had not been ineffective for failing to pursue the *Batson* claim. The case was remanded for consideration of prosecutorial misconduct claims decided by the district court, *Sistrunk v. Vaughn*, 96 F.3d 666 (3d Cir. 1996). On remand, the federal district court denied Sistrunk habeas corpus relief on the prosecutorial misconduct claims. The Third Circuit granted a certificate of appealability, and the case is now pending, (CA. No. 99-1477).

A timely appeal of the denial of post-conviction relief was denied by the Pennsylvania Superior Court in an unreported opinion on January 25, 1999, and on September 23, 1999, the Pennsylvania Supreme Court denied a timely filed petition for allowance of appeal. Petitioner's post-conviction action was pending in the Pennsylvania courts from January 11, 1996, until it was concluded on September 23, 1999. The present habeas corpus action was timely filed within one year of September 23, 1999, after equitable tolling had concluded. *Swartz v. Meyers*, 204 F.3d 417 (3d Cir. 2000).

Petitioner then instituted this post-conviction relief proceeding, filing a habeas petition on May 22, 2000. On July 26, 2001, the District Court adopted the findings of the Magistrate Judge, denying Mr. Mims' habeas petition. Despite the grant of a certificate of appealability to Mr. Mims' codefendant, Sistrunk, on similar habeas corpus claims, the District Court *sua sponte* issued a denial of a Certificate of appealability without providing any explanation. Mr. Mims filed a notice of appeal on August 24, 2001. As related earlier, Mr. Mims' application for a certificate of appealability was denied by the Third Circuit and the petition for rehearing *en banc* was also denied. This petition followed.

D. Standard of Review of Denial of Certificate of Appealability

Under 28 U.S.C. § 2253 and Rule 22(b) of the Federal Rules of Appellate Procedure, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a habeas petitioner who wishes to appeal from a final order of a District Court must obtain a certificate of appealability ("COA") for each claim he wishes to present to the Court of Appeals. In *Slack v. McDaniel,* 120 S. Ct. 1595, 1603 (2000), this Court concluded that "[e]xcept for substituting the word 'constitutional' for the word 'federal,'" AEDPA's COA requirement is merely "a codification of 'the pre-AEDPA standard for granting a certificate of probable cause ("CPC"),

as announced in *Barefoot v. Estelle,*" 463 U.S. 880, 894 (1983). Thus, under AEDPA, the COA plays the same role as the pre-AEDPA CPC, which had long been required for petitioner appeals in habeas cases.

The purpose of the COA requirement is "to prevent frivolous appeals." *Barefoot,* 463 U.S. at 893. A COA must, therefore, be granted if any issue is "debatable among jurists of reason," "a court could resolve the issue[] [in a different manner]" or "the question[] [is] adequate to deserve encouragement to proceed further." *Id.* at 893 n.4. In ruling on a COA application, the Court should resolve any doubts "in favor of the petitioner." *Jones v. Warden*, 402 F.2d 776 (5th Cir. 1968); *accord Whitehead v. Johnson*, 157 F.3d 384, 386 (5th Cir. 1998).

REASONS FOR GRANTING THE PETITION

Fifteen years ago, Petitioner was convicted of murder — based *solely* on two fundamentally flawed, cross-racial eyewitness identifications[7] that occurred several years after the crime was committed — in a trial so pervasively infected by racial bias and constitutional error that it would never be permitted to stand today. The prosecutor's intentional racial discrimination and deeply offensive, outrageous remarks were calculated to inflame the prejudices of the all-white jury during a time of extraordinary racial fear and hostility in Philadelphia.

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7. Such testimony is notoriously unreliable, especially where, as here, the identifying witnesses are white, petitioner is African-American, and the jury is white; the trial takes place in a city rife with a then-recent history of racial and religious divisiveness and demagoguery (especially surrounding Black Muslims involved in the Nation of Islam); and the Commonwealth, as here, was represented by a prosecutor who eagerly and relentlessly appealed to racial and religious prejudice throughout the trial. *See, e.g.*, B. SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); and E.M. BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE (CIVIL LIBERTIES IN AMERICAN HISTORY) (1970).

The inevitable resulting conviction is a sad example of the injustice that results from the volatile mixture of racism, prosecutorial misconduct, and unreliable eyewitness identification. It is time, at long last, to correct that injustice.

The numerous individual reasons why the COA should have been granted are set forth below. This Court should keep in mind that the prosecutor purposefully sought to exclude African-American human beings from the jury, and then repeatedly sought to take advantage of the all-white jury by making remarks calculated to inflame their passions. The prosecutor's actions took place in a time and a city burdened by pervasive and virulent racial hostility. While each of the identified errors alone provides a basis for relief, their cumulative effect is such that Petitioner simply did not get anything resembling a fair trial, and his conviction is inherently unreliable.

I. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE TRIAL COURT UNCONSTITUTIONALLY PRECLUDED WITNESS TESTIMONY CONCERNING THE SUGGESTIVE NATURE OF THE IDENTIFICATIONS

Relevant evidence from a witness cannot be excluded simply because a court may think that another witness that the other side may have to offer in rebuttal is more believable on the point or that the witness is not believable. *Ballou v. Henri Studios. Inc.*, 656 F.2d 1147 (5th Cir. 1981); *Commonwealth v. Greene*, 366 A.2d 234, 237 (Pa. 1976). It is also well established constitutional law that relevant, material defense evidence may not be excluded at trial on this basis. *Rock v. Arkansas*, 483 U.S. 44 (1987); *Crane v. Kentucky*, 476 U.S. 683 (1986); *Davis v. Alaska*, 415 U.S. 308 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967). Because Mr. Mims was denied his right to offer relevant, material evidence to rebut the only prosecution evidence linking him to the crime, as explained further below, there was a sufficient

showing to grant the certificate of appealability that Mr. Mims' due process and compulsory process rights were denied.

A. The DiMeo Identification

At Petitioner's second trial, where the entire issue was identification, the Commonwealth had only the identification testimony of Audrey DiMeo, and the prior testimony of Louis Gruby, who had identified a completely different individual when asked to make an identification at the first trial. DiMeo's identification of Petitioner at the second trial in 1981, ten years after the incident, was her first in-person identification of Petitioner.

The defense was precluded from presenting the testimony of Barry Denker, Petitioner's former counsel, who would have testified that DiMeo, in violation of a sequestration order, had an in-person encounter with Petitioner prior to her identification of him at this 1981 trial. He would have testified that in 1975, while Petitioner stood with a group of men in a courtroom hallway, a detective with DiMeo pointed Petitioner out in the group and said, "That's the one."

The District Court, like the Pennsylvania Superior Court and apparently the Third Circuit, erroneously concluded that the issue was whether DiMeo's identification testimony should have been precluded, which would have required a defense showing of suggestiveness that would convince a court that her identification testimony was too unreliable to be admitted at trial. In fact, the constitutional question raised is the very different one of the preclusion of defense testimony after DiMeo's testimony was admitted. Distinct from a motion to suppress, there is no comparable burden at trial for the defense to have the constitutional right to present defense testimony to attack the reliability and accuracy of a trial witness offered by the Commonwealth. *Crane v. Kentucky*, 476 U.S. 683 (1986), not cited by the District Court, unanimously rejected the type of due process analysis employed by the court to reject the

meritorious constitutional claim presented here. *See also Manson v. Brathwaite*, 432 U.S. 98, 116 (1977).

It was clearly erroneous for the Superior Court to conclude, and the District Court and Third Circuit to uphold, that the courtroom hallway confrontation was not suggestive and then to hold that there was no constitutional error. It was for the jury to hear Denker's account and determine whether and how much the hallway confrontation would affect its evaluation of DiMeo's testimony.

Further, the first trial judge expressed doubts as to the credibility of DiMeo and the detective, and concluded that Denker would have a right to testify concerning the confrontation if DiMeo made an in-court identification. The findings of that judge, the only one to hear and observe the witnesses, are the ones entitled to deference. *See, e.g., Campbell v. Vaughn*, 209 F.3d 280, 287-88 (3d Cir. 2000). Because Petitioner, however, was unable to offer such evidence, he was denied rights guaranteed to him under the Fifth and Sixth Amendments.

B. The Gruby Identification

The defense was precluded from offering any evidence, including the testimony of O'Connor, concerning the circumstances of Gruby's identification of O'Connor as the perpetrator. The District Court concluded, and the Third Circuit apparently agreed, that there was no constitutional error because from the reading of the transcript "the circumstances of the identification were perfectly clear." App. 31a. This is clearly wrong. The jury at the second trial never saw what O'Connor looked like. O'Connor's testimony would have established that he is significantly younger, shorter, and different looking than Petitioner, and that any accurate, reliable identification witness would not have mistaken O'Connor for Petitioner. The exclusion of this material evidence unreasonably violated Petitioner's due process and compulsory process rights. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

II. THE PETITION SHOULD BE GRANTED BECAUSE THE TRIAL COURT UNCONSTITUTIONALLY CONDITIONED ADMISSION OF GRUBY'S IDENTIFICATION OF SOMEONE ELSE ON ADMISSION OF THE SUBSEQUENT IDENTIFICATION ALREADY FOUND TO BE UNDULY SUGGESTIVE

Petitioner's first conviction had been reversed by the state's highest court because the circumstances surrounding Gruby's in-court identification of Petitioner were unnecessarily suggestive. In addition, the Pennsylvania Supreme Court ruled that the identification had been obtained in violation of the effective assistance of counsel when counsel failed to object to the judicial questions and suggestiveness that produced an unnecessarily suggestive identification. *Commonwealth v. Mims*, 392 A.2d 1290 (Pa. 1978).

Astonishingly, the District Court concluded with the apparent agreement of the Third Circuit, that the constitutional error could be cured by admitting the offending identification, and by simply changing the names so that the unduly suggestive, leading directions previously given by the first trial judge appeared to have been given by the prosecutor. The most reasonable reading of the Pennsylvania Supreme Court opinion is that the Gruby identification of Petitioner would not have occurred except for the improper suggestive actions of the trial judge, and that the circumstances were so unfair that it was ineffective assistance for counsel not to object to them. Amending the transcript would not have changed what actually happened and how and why the Gruby identification of Petitioner was obtained at the first trial.

III. THE PETITION SHOULD BE GRANTED BECAUSE THE PROSECUTOR VIOLATED DUE PROCESS IN HER EXTENSIVE ARGUMENT THAT PETITIONER ARRANGED AN UNFAIR LINEUP OF CLONES TO FOOL THE IDENTIFICATION WITNESS

The prosecutor made extensive argument, in a theme returned to again and again and consuming several pages in her closing, that Gruby's in-court identification of someone else was due to Petitioner's purposeful attempt to fool Gruby with a 16 person "clone" lineup. She did so despite the fact that she knew it was false and there was not a shred of evidence to back up this claim. That baseless argument violated Petitioner's Due Process rights. The District Court found this claim to have been fairly presented, but erroneously rejected it on the merits. App. 55a-58a.

The District Court concluded that the prosecutor's remarks constituted a proper response in "emphasizing the circumstances under which Gruby misidentified." App. 57a. There are three problems with that conclusion. One, the lineup was court approved — there was no improper defense tactic. Two, the defense had been precluded from presenting the man identified, O'Connor, or any other witness to show whether the men in the court approved courtroom were similar or not to Mims or any other circumstances of the Gruby trial identification procedure. Three, *there was no evidentiary support at this trial for this closing argument on the critical issue of identification. See, e.g., Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000) (inaccurate comments suggesting defendant "somehow manipulated the judicial system for his own gain" violated Due Process); *United States v. Wilson*, 135 F.3d 291 (4th Cir. 1998) (due process violated by closing argument statement of prejudicial "fact" not supported by any record evidence).

The egregious misconduct on the critical issue of identification warrants granting this petition.[8]

IV. THIS PETITION SHOULD BE GRANTED BECAUSE THE PROSECUTOR'S EGREGIOUS MISCONDUCT VIOLATED DUE PROCESS

A. Misconduct During the Presentation of Evidence

During the presentation of evidence, the prosecutor continually harassed Petitioner's Black Muslim witnesses for adopting Muslim names (N.T. 14.152-153), and impermissibly referred to witnesses inadmissible prior arrests and displayed arrest photos in an effort to discredit them. She also implied that members of the Nation of Islam did not believe in following the law. App. 38a. She also repeatedly stated that Petitioner had been arrested in Chicago for the Dubrow's murder, which she knew to be false. App. 47a-49a. She commented on Petitioner's waiver of a preliminary hearing, claiming that Petitioner had waived in order to avoid confrontation with the Commonwealth's identification witnesses. App. 51a.

The District Court concluded that many of the prosecutorial misconduct claims during the presentation of evidence were procedurally defaulted. App. 37a-50a. That ruling is wrong as a matter of law and the Third Circuit should have granted the application for certificate of appealability on this point, as well as the other points in this petition. The District Court interpreted a ruling by the Superior Court on appeal from the denial of PCRA relief that an issue was previously litigated on direct appeal and will not be reviewed again as an "adequate and independent state" ground barring habeas relief. *E.g.*, App. 39a,

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8. The error was compounded by the persistent argument that the subsequent identification of Petitioner by Gruby was the only fair procedure. This was improper argument, and the District Court erred in concluding that the Pennsylvania Supreme Court did not hold that the identification procedure producing this identification was unnecessarily suggestive. *See Commonwealth v. Mims*, 392 A.2d 1290 (Pa. 1978).

53a-54a, 58a-59a, 60a-62a. This is incorrect — it is simply a state court determination that an issue will not be considered a second time in any form that has already been considered before. In fact, there is no obligation for federal habeas purposes that there even be an attempt to raise a claim on collateral PCRA review that has been addressed on direct appeal, and there can be no procedural default or failure to exhaust found for the complete failure at the PCRA stage to raise a previously litigated claim or the manner in which it is attempted to be raised. *E.g., Lambert v. Blackwell*, 134 F.3d 506, 519-20 (3d Cir. 1997); *People v. Fulcomer*, 882 F.2d 828, 829, n.1 (3d Cir. 1989).

The District Court also repeatedly found with respect to several claims an adequate and independent state ground procedural default, simply because the state court decided an issue on state grounds. *E.g.*, App. 47a. Again, that ruling was wrong as a matter of law. The "adequate and independent state ground" doctrine applies only when a state court has refused to hear Petitioner's claims because he failed to meet a state procedural requirement. The proper federal question in deciding whether there has been a procedural default is whether Petitioner fairly presented the federal claim to the state courts. Petitioner could not now go back to state court and raise any claims because of PCRA time bar limitations. 42 Pa. C.S. § 9545(b). *See, e.g., Lines v. Larkins*, 208 F.3d 153, 164 (3d Cir. 2000). "[C]laims must have been presented to the state courts; they need not have been considered or discussed by those courts." *Swanger v. Zimmerman*, 750 F.2d 291, 295 (3d Cir. 1984). *Smith v. Digmon*, 434 U.S. 332 (1978) (per curiam) (same).

On direct appeal, counsel argued that prosecutorial misconduct denied Petitioner a fair trial. Among his claims was the complaint that the prosecutor had prejudicially and improperly belittled the Black Muslim defense witnesses during their cross-examination, and suggested in her questions that these Muslims felt they need not follow the laws of the United States. *See* App. 38a-43a. Counsel also raised the claim(s) that

mug shots of defense witnesses were improperly displayed to the jury, and that there had been improper cross-examination of defense witness Schuler about prior arrests, and of defense witness Ali about hiding in the basement. The Superior Court on direct appeal considered and decided these issues involving alleged prosecutorial misconduct during the testimony of defense witnesses, and denied relief because it concluded that Petitioner had not been denied a fair trial. Pa. Super. 12/14/84, 4-23.

The federal claim was fairly presented on direct appeal on these prosecutorial misconduct denial of a fair trial claims because they were presented and analyzed in the same manner as a due process claim. Preservation may be accomplished without "citing book and verse on the federal constitution." *Picard v. Connor*, 404 U.S. 270, 278 (1971). *See* App. 55a, n.33. Under very similar circumstances, the Third Circuit itself has held that the jointly tried co-defendant, Sistrunk, preserved in state court his prosecutorial misconduct due process claims in this case. *Sistrunk v. McCullough*, No. 97-1538 (3d Cir. July 27, 1998).

As noted in the District Court's opinion, the claims concerning the prosecutor's statements and questions pertaining to Petitioner's arrest in Chicago (App. 47a-49a), his access to money and a Cadillac when arrested (App. 47a-49a), and his waiver of a preliminary hearing (App. 51a), were not raised on direct appeal. However, no procedural default of these claims should be found, and, if so it is excused because of an ineffective prejudicial failure of counsel to preserve these meritorious claims, and any others found meritorious, through trial and direct appeal.[9]

Although not altogether clear, it seems that part of the District Court's reason for finding a procedural default of some of these claims is that the argument raised on PCRA was a

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9. The same counsel represented Petitioner at the second trial and through direct appeal.

prosecutorial misconduct claim, while the Superior Court on PCRA appeal viewed the claim as more properly one concerning the admissibility of evidence. *See* App. 47a-49a, 51a. This could not be an adequate and independent state ground procedural default because in the Superior Court's 1984 opinion, and in many Pennsylvania Supreme Court cases, a prosecutorial misconduct claim has been recognized as the proper way to bring the claim. It is thus not a firmly established and clearly and consistently applied state rule which could support a finding of procedural default. *See, e.g., Doctor v. Walters*, 96 F.3d 675, 683 (3d Cir. 1996).

The District Court recognized that the claim involving the cross-examination of a Muslim defense witness was appropriately preserved. App. 39a, n.23. *See Picard v. Connor*, 404 U.S. 270, 277 (1977); *Fennell v. Goosby*, 630 F. Supp. 451, 455 (E.D. Pa. 1985). Yet it rejected Petitioner's claim despite case law holding that this kind of due process violation warrants habeas relief. *See, e.g., United States v. Cannon*, 88 F.3d 1495, 1502-03 (8th Cir. 1996) (reversible prosecutorial misconduct for prosecutor to argue that black defendants, tried in North Dakota, were bad outsiders). The harm was compounded during closing argument when the prosecutor told the jury more than once that the African-Americans homicide victim and his wife were happy with their names (like the jurors and the prominent Black Americans, but unlike the Black Muslim defense witnesses).

B. Misconduct During Closing Arguments

During closing arguments there was extensive unreasonable prosecutorial misconduct. First the prosecutor denigrated Petitioner for exercising his constitutional right to mount a defense. The prosecutor argued, "why put on a defense at all," and then answered her rhetorical question with a statement that in light of the strength of the Commonwealth identification witnesses, "the defense was in trouble." N.T. 19.168 (11/17/81). Next, the prosecutor also made

prejudicial, improper remarks concerning the presumption of innocence, which the District Court found to be acceptable (App. 54a, n.32), even though the Tenth Circuit has concluded that very similar remarks required the grant of habeas corpus relief because they denigrated a specific due process right. *Mahoney v. Wallman*, 917 F.2d 469, 471-73 (10th Cir. 1990); *see also Floyd v. Meachum*, 907 F.2d 347, 354 (2d Cir. 1990) (remarks undermined presumption of innocence). The District Court held that these claims were procedurally defaulted.[10]

During closing argument, with no conceivable possible permissible purpose, and with the clear intent to prejudice the jury against the Black Muslin defense witnesses who all changed their names, twice Ms. Christie told the jury that the black murder victim and his wife were happy with the names they got from their parents. As with the grossly improper cross-examination mocking the religion of the Black Muslim defense witnesses, the District Court concluded that these comments were proper. App. 59a, n.37. The District Court also found a procedural default even though it concluded that the issue was raised and decided on direct appeal. App. 58a-59a. As with the cross-examination claim, this Court should include that it was fairly presented and not defaulted for habeas purposes, or that ineffectiveness provides cause and prejudice for any procedural default.

Finally, the prosecutor implored the jurors repeatedly to imagine themselves as the victim of the crime, in an effort to get a verdict from the jury on the basis of the horror of the

10. On the merits, the District Court also rejected a claim that the prosecutor's comments concerning Petitioner's waiver of a preliminary hearing, implying that it was to avoid a confrontation with the identification witnesses, was a fair response. App. 54a-55a These remarks, N.T. 19.145-146 (11/17/81) were intertwined with the entire improper theme concerning the "clones" and Gruby's identification. The District Court's finding of a procedural default is incorrect because ineffective assistance of counsel excuses the default at trial and direct appeal, and the issue was timely raised at PCRA proceedings.

crime, rather than the doubtful evidence linking Petitioner to the commission of the crime. App. 60a-61a. Such arguments have been condemned because they are "directed to passion and prejudice rather than to an understanding of the facts and the law." *Lesko v. Lehman*, 925 F.2d 1527, 1545 (3d Cir. 1991), *quoting United States ex rel. Perry v. Mulligan*, 544 F.2d 674, 680 (3d Cir. 1976), *cert. denied*, 430 U.S. 972 (1977). The District Court found this claim to be procedurally defaulted because it was not raised by trial counsel on direct appeal. Again the court should have concluded that ineffective assistance of counsel provided cause and prejudice to excuse the procedural default.

V. THIS COURT SHOULD GRANT THE PETITION BECAUSE PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS WERE NOT PROCEDURALLY DEFAULTED

The District Court held that a procedural default of ineffective assistance of counsel claims occurred in state court because "the claims were either not raised nor fairly presented." App. 68a-69a. This conclusion was clearly erroneous. This Court has held that it is not the role of a federal court to decline to hear habeas claims when the state courts either did not bar consideration of the claims or find that they were inadequately presented. The "adequate and independent state grounds" doctrine "applies to bar federal habeas when a state a court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991).

The Superior Court decided on the merits that counsel was not ineffective for failing to properly preserve underlying issues concerning the trial court's refusal to permit defense evidence concerning the hallway confrontation between Petitioner and DiMeo and the defense evidence concerning the circumstances of the identification of O'Connor by Gruby. *See* N.T. 1/25/99, Pa. Super. 3-7. Therefore, the decision that these two ineffective

assistance claims relating to the preclusion of defense evidence are procedurally defaulted (App. 68a-69a) was clearly erroneous.

The filings in the District Court specifically alleged that the ineffective assistance claim concerning the preclusion of defense evidence about the hallway confrontation between Petitioner and DiMeo. Therefore it is clear that this claim, which was fairly presented to the state courts, was raised sufficiently in the District Court to preserve it for federal habeas review. Each underlying meritorious issue had specified in the pleadings (and discussed in the court's opinion), and counsel's ineffectiveness claims with respect to the underlying merits had also been specified. The District Court also erred in finding some ineffectiveness claims concerning prosecutorial misconduct procedurally defaulted because of a Superior Court finding on PCRA appeal that they were previously litigated. App. 70a-72a. A finding that an issue has been previously litigated to bar consideration of an ineffectiveness claim is not a state procedural default finding, and if it was, it could not provide an adequate and independent state ground to bar habeas review of the claim.

Petitioner should have his petition heard on the ineffectiveness claims not only because there was an unreasonable denial of his right to the effective assistance of counsel but also, independently, because the state courts employed an erroneous and overly burdensome standard for establishing ineffective assistance. The District Court's opinion erroneously concluded that the state court applied the correct ineffectiveness standard solely because it cited a single state case that did so, even though that case repeatedly and explicitly employed an incorrect and more burdensome test than that of *Strickland v. Washington*, 466 U.S. 668 (1984). App. 65a-66a. It also found that if the state court employed the wrong standard in evaluating the ineffectiveness claim, it was harmless error. App. 65a, n.39.

The ineffective assistance of counsel claims have not been procedurally defaulted and they provide an independent basis for relief. *See, e.g.*, *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *United States v. Manning*, 212 F.3d 835, 840 (3d Cir. 2000); *United States v. Cook*, 45 F.3d 385 (10th Cir. 1995). Further, this Petition should be granted because, in violation of *Strickland*, the Superior Court employed an incorrect and more burdensome ineffectiveness standard, and that 28 U.S.C. § 2254(d) and *Williams v. Taylor*, 529 U.S. 362 (2000), require that the petition be granted.

CONCLUSION

For the foregoing reasons, Petitioner, Robert Mims respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED NOVEMBER 22, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 01-3349

ROBERT MIMS

v.

DAVID CRIST, et al.

(E.D. Pa. Civ. No. 00-cv-02655)

ORDER

Appellant's request for a certificate of appealability is denied. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Appellant has failed to make a substantial showing of the denial of a constitutional right. *See* 29 U.S.C. § 2253(c).

By the Court,

s/ [illegible]
Circuit Judge

Dated: NOV 22 2002

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED AND FILED JULY 26, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 00-2655

ROBERT MIMS,

Petitioner,

v.

DAVID CRIST, et al.,

Respondents

ORDER

AND NOW, this 26th day of July, 2001, upon careful and independent consideration of the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, and after review of the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi, and any objections thereto, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.

Appendix B

2. The petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 is DENIED.

3. There is *no* basis for the issuance of a certificate of appealability.

BY THE COURT:

s/ Harvey Bartle
~~LOUIS C. BECHTLE~~, J.

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED APRIL 12, 2001 AND FILED APRIL 16, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 00-2655

ROBERT MIMS,

Petitioner,

v.

DAVID CRIST, et al.,

Respondents

REPORT AND RECOMMENDATION

PETER B. SCUDERI
UNITED STATES MAGISTRATE JUDGE

April 12, 2001

Presently before this court is a counseled Petition for Writ of Habeas Corpus filed on May 22, 2000, pursuant to 28 U.S.C. § 2254, by Robert Mims ("Petitioner").[1] Petitioner is currently incarcerated at the Minnesota Correctional

1. Although Petitioner changed his name to Ameen Jabar following his conversion Islam, the caption of his habeas petition retains his pre-conversion name.

Institution at Stillwater, Minnesota.[2] For the reasons that follow, I recommend that the petition be denied.

I. FACTS AND PROCEDURAL HISTORY[3]

On January 4, 1971, at approximately 2:00 p.m., Petitioner and seven (7) other men walked into Dubrow's Furniture Store in Philadelphia, Pennsylvania, pretending to be customers. The eight (8) perpetrators bound at least thirteen (13) people hand and foot on the floor of the store, took all of their valuables, and poured gasoline on them. When one (1) man tried to escape, they shot him three (3) times, killing him. The perpetrators lit several fires around the store and terrorized their bound victims by, among other things, kicking and pistol-whipping them, setting fire to the legs of one (1) man, and shooting others.[4] Two (2) days later, survivors Louis Gruby and Audrey DiMeo looked at an array of photographs and picked out Petitioner as one (1) of the perpetrators.[5]

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2. Petitioner was a Pennsylvania prisoner before his transfer to Minnesota due to his prison activities.

3. The following background information was obtained from the state court record, Petitioner's counseled habeas petition and brief in support thereof, Respondents' answer, and Petitioner's traverse.

4. All of the remaining victims survived.

5. Gruby and DiMeo were the only two (2) store employees able to identify any of the participants in the crime. Two (2) other participants described and picked out by Gruby and DiMeo were arrested shortly after the Dubrow's incident; the other five (5) have never been found.

Appendix C

Petitioner remained at large for several years while being pursued by the police and the Federal Bureau of Investigation ("FBI") on a federal warrant for both the incident at Dubrow's as well as a subsequent bank robbery. Eventually, the FBI identified Petitioner in a national magazine photograph standing in a crowd in Chicago, Illinois. The FBI focused its search on Chicago, where Petitioner was living under the assumed name of Robert Lee Greene, and arrested him there on September 20, 1974.

Petitioner waived a preliminary hearing on the state charges related to the Dubrow's incident. On April 2, 1975, the Commonwealth moved for trial on eight (8) bills of indictment before the late Honorable Paul M. Chalfin, Court of Common Pleas of Philadelphia County. Bills Nos. 653-655 (murder, conspiracy, arson), 662 and 664 (aggravated robbery), 677 (aggravated assault and battery), and 679-680 (aggravated assault and battery with intent to kill). Petitioner's first jury trial, including a hearing on his motion to suppress the witnesses' photographic identifications, ran from April 2 to April 18, 1975.

Prior to the first trial, the court held an evidentiary hearing and ruled that DiMeo, one (1) of the two (2) Commonwealth identification witnesses, had violated the court's sequestration order when she passed Petitioner in a hallway. Although Judge Chalfin ruled that DiMeo would be permitted to identify Petitioner in court, subject to cross-examination regarding the sequestration violation, the Commonwealth did not ask DiMeo to do so. (N.T. 4/15/75, 2-37, 242-270.)

Appendix C

During the first trial, Judge Chalfin permitted an in-court, seated line-up to occur in the presence of the jury.[6] At that time, Gruby, the Commonwealth's second identification witness, initially identified someone other than Petitioner. Judge Chalfin questioned Gruby and asked the persons in the line-up to stand up for the first time. After they stood, Gruby identified Petitioner and explained to the court that his initial, erroneous identification was primarily due to the fact that everyone had been seated. (N.T. 4/16/95, 163-241.) On April 18, 1975, the jury found Petitioner guilty of all charges.

Petitioner retained new counsel to file post-verdict motions.[7] On August 8, 1975, counsel filed a motion for a new trial or arrest of judgment, and argument was heard by a three- (3-) judge panel on October 9, 1975.[8] On May 11, 1976, the panel denied Petitioner's motion. Two (2) days later, Petitioner was sentenced to life imprisonment for the murder,

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6. The persons in the seated line-up were selected by the defense and apparently consisted of several African-American males who were shorter than Petitioner, who is six (6) feet, four (4) inches tall.

7. Petitioner's first trial counsel was the late Barry Denker, Esquire. The late Louis Lipschitz, Esquire, was retained by Petitioner for purposes of post-verdict motions and direct appeal from his first conviction, his subsequent retrial, and direct appeal from his second conviction. Petitioner's present counsel is Leonard Sosnov, Esquire, who also served as counsel for purposes of collateral appeal following Petitioner's second trial.

8. On January 24, 1976, while these motions were pending and prior to Petitioner's sentencing, Gruby and his wife were murdered in their home by a person or persons unknown.

plus a concurrent term of five (5) to ten (10) years for the arson. Sentence was suspended on all other convictions.

Petitioner appealed his judgment of sentence directly to the Pennsylvania Supreme Court, raising fifteen (15) claims, many with multiple sub-parts. In a published opinion dated October 6, 1978, the Pennsylvania Supreme Court reversed and granted Petitioner a new trial based solely upon counsel's ineffectiveness for failing to object to Judge Chalfin's involvement in Gruby's in-court identification of Petitioner.[9] *Commonwealth v. Mims*, 392 A.2d 1290 (Pa. 1978). Petitioner was released on bail pending retrial.

On February 5, 1979, for purposes of his upcoming retrial, Petitioner filed a motion to suppress evidence, including the prior identification testimony of Gruby and the upcoming in-court identification testimony of DiMeo.[10] Following argument, the late Honorable Myrna Marshall, Court of Common Pleas of Philadelphia County, granted suppression as to Gruby's in-court identification, suppressing listed lines of testimony, and denied Petitioner's motion to

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9. The Pennsylvania Supreme Court held that because Judge Chalfin directed Gruby to make a second attempt at identifying Petitioner from a lineup of seven (7) men with similar characteristics, the trial court rendered the identification procedure unduly suggestive and improperly injected itself into court proceedings. *Mims*, 392 A.2d at 1293.

10. Gruby had been murdered after the first trial and, therefore, his identification testimony could only be presented at the retrial through the introduction of his former testimony. DiMeo, who had not identified Petitioner during the first trial, was available to testify at the retrial.

suppress the identification testimony of DiMeo. Petitioner also filed a motion to dismiss on double jeopardy and due process grounds. Judge Marshall denied this motion, and on May 30, 1980, the Pennsylvania Supreme Court affirmed. *Commonwealth v. Mims*, 414 A.2d 350 (Pa. 1980) (*per curiam*) (table).

On April 24, 1979, Petitioner filed a counseled federal habeas petition with this court challenging the amount of his bail. The petition was denied by the Honorable Louis C. Bechtle and Petitioner did not appeal. On July 21, 1980, Petitioner filed a second counseled federal habeas petition, raising the same double jeopardy grounds which had been rejected by the Pennsylvania Supreme Court. Judge Bechtle denied the second habeas petition, and the Third Circuit affirmed on March 19, 1982. *Mims v. Cuyler*, 681 F.2d 807 (3d Cir. 1982) (table).

On May 13, 1981, Petitioner was arrested on drug possession and other charges, and the Commonwealth moved to revoke bail. The Honorable Paul Ribner, Court of Common Pleas of Philadelphia County, held evidentiary hearings and heard argument on the bail motion, as well as the Commonwealth's petition to consolidate Petitioner's retrial with that of an alleged accomplice in the Dubrow's incident, Edward Sistrunk. On July 21, 1981, Judge Ribner consolidated the two (2) cases and denied Petitioner's motion to dismiss on grounds of undue delay and double jeopardy. The assigned retrial judge was the Honorable Albert F. Sabo, Court of Common Pleas of Philadelphia County. On October 15 and 16, 1981, Judge Sabo heard argument on Petitioner's motion to suppress the physical evidence found on Petitioner

at the time of his arrest by the FBI in Chicago in 1974. Judge Sabo denied the motion, as well as Petitioner's request to re-litigate the suppression of all identification evidence of Gruby and DiMeo.

The consolidated retrial began on October 23, 1981, and on November 19, 1981, Petitioner was again convicted of all charges. Bills Nos. 653-680, November Term 1974. Judge Sabo denied all of Petitioner's post-verdict motions: On January 10, 1983, Petitioner was again sentenced to life in prison for the murder, plus two (2) consecutive ten (10) to twenty (20) year terms of imprisonment for the arson and aggravated robbery, and one (1) concurrent term for the second aggravated robbery charge. Sentence was suspended on the remaining charges.[11]

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11. Petitioner's co-defendant, Sistrunk, was also sentenced to life imprisonment, as was a third defendant, Ronald Boelter, who was tried separately. Subsequently, Sistrunk was denied relief on appeal to the Pennsylvania courts. The federal district court granted Sistrunk habeas corpus relief on grounds of an equal protection violation under *Batson v. Kentucky*, 476 U.S. 79 (1986), as well as ineffectiveness of counsel for failing to preserve the claim on appeal. The Third Circuit reversed, holding that counsel had not acted ineffectively, and remanded for consideration of additional claims of prosecutorial misconduct without deciding the merits of the *Batson* claim. *Sistrunk v. Vaughn*, 96 F.3d 666 (3d Cir. 1996). On remand, the district court denied habeas corpus relief on the prosecutorial misconduct claims. A certificate of appealability was granted by the Third Circuit, where the case is now pending at C.A. No. 99-1477.

Appendix C

Petitioner appealed his retrial judgment of sentence to the Pennsylvania Superior Court, raising the following claims relevant to the instant habeas petition:

1. Whether Petitioner was deprived of a fair trial due to prosecutorial misconduct;

2. Whether the retrial court erred in permitting the introduction of Gruby's testimony from the first trial, and whether the court erred in precluding defense evidence related to Gruby's misidentification of Petitioner;

3. Whether the retrial court erred in refusing to grant a hearing on Petitioner's motion to suppress DiMeo's testimony due to her sequestration violation;

4. Whether evidence of prior crimes deprived Petitioner of a fair trial;

5. Whether the retrial court erred in admitting evidence of Petitioner's "flight;" and

6. Whether Petitioner was deprived of his constitutional rights due to the exclusion of black jurors.

On December 14, 1984, the Superior Court affirmed the retrial court's judgment of sentence. *Commonwealth v. Mims*, 490 A.2d 12 (Pa. Super. 1984) (table). Petitioner sought discretionary review from the Pennsylvania Supreme Court

and raised, *inter alia*, the following issues relevant to the instant habeas petition:

1. Whether Petitioner was deprived of a fair trial due to prosecutorial misconduct;

2. Whether the 1984 Pennsylvania Superior Court decision (affirming Judge Sabo's ruling as to the admissibility of Gruby's in-court identification at retrial) effectively overruled the 1978 Pennsylvania Supreme Court decision (granting a retrial on grounds of ineffectiveness of counsel for failing to object to the trial court's involvement in Gruby's in-court identification), and whether this error was compounded by alleged ineffectiveness of counsel and the denial of the right to confrontation at the first trial; and

3. Whether the retrial court erred in refusing to grant a hearing on Petitioner's motion to suppress DiMeo's testimony due to her sequestration violation.

On September 30, 1985, the Pennsylvania Supreme Court denied discretionary review.

On March 24, 1987, Petitioner filed a *pro se* petition for relief under the Pennsylvania Post Conviction Hearing Act ("PCHA"), 42 Pa. Cons. Star. Ann. §§ 9541 *et seq.* (superseded and replaced by the Post Conviction Relief Act in 1988). According to Respondents, there are no further records regarding the PCHA petition; if it was denied, Petitioner did not appeal.

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On January 11, 1996, Petitioner filed a counseled petition under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Star. Ann. §§ 9541-9564. Petitioner raised sixteen (16) grounds for relief in his PCRA petition, including the following issues relevant to the instant habeas petition:

1. Whether retrial counsel ways ineffective for failing to cross-examine DiMeo about her sequestration violation at the first trial, and whether Petitioner's rights were violated when Judge Sabo excluded the testimony of Petitioner's first trial counsel regarding the incident;

2 Whether Petitioner's rights in the retrial were violated under the future decision of *Batson v. Kentucky*, 476 U.S. 79 (1986), the prior decision in *Swain v. Alabama*, 380 U.S. 202 (1965), and whether counsel was ineffective with respect to these issues;

3. Whether Petitioner's due process and effective assistance of counsel rights were violated as a result of numerous allegedly improper actions by the prosecutor, and trial counsel, regarding certain testimony and evidence presented at retrial;

4. Whether Petitioner's rights were violated when Judge Sabo prohibited evidence of Gruby's misidentification of Petitioner at the first trial;

5. Whether the prosecutor violated Petitioner's rights during questioning of defense witnesses and repeated some of the elicited testimony during closing;

6. Whether the prosecutor violated Petitioner's due process rights during closing argument;

7. Whether the retrial was so infected with fundamental unfairness so as to violate Petitioner's due process rights;

8. Whether prosecutorial misconduct was so intentional and pervasive that another retrial would violate Petitioner's double jeopardy and due process rights; and

9. Whether prior counsel was ineffective, and therefore violated Petitioner's due process rights, for failing to preserve and argue all of the above issues "throughout all of the proceedings."

Judge Sabo presided over the PCRA hearing. Although Petitioner introduced various affidavits attached to his petition, as well as the records of the PCRA proceedings of his co-defendant, Sistrunk, Petitioner did not present witnesses and did not present an affidavit from his former counsel.[12] (N.T. 2/3/97, 10-11.) On June 26, 1997, Judge Sabo denied relief.

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12. Louis Lipschitz, Esquire, now deceased.

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Petitioner appealed to the Pennsylvania Superior Court, raising the following issues relevant to the instant habeas petition:

1. Whether former counsel provided effective assistance at every stage;

2. Whether compulsory and due process rights were violated when Judge Sabo refused to permit any evidence of DiMeo's sequestration violation;

3. Whether compulsory and due process rights were violated when Judge Sabo refused to permit evidence of Gruby's misidentification of Petitioner;

4. Whether due process was violated as a result of prosecutorial misconduct at trial;

5. Whether due process was violated as a result of prosecutorial misconduct at closing argument;

6. Whether the prosecutor violated Petitioner's equal protection rights under the future *Batson* decision; and

7. Whether due process was violated by alleged prosecutorial misconduct in asking defense witnesses improper questions.

On January 25, 1999, the Superior Court affirmed the PCRA court's denial of relief. *Commonwealth v. Mims*, 736 A.2d 683 (Pa. Super. 1999) (table).

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Petitioner again sought *allocatur* from the Pennsylvania Supreme Court, raising the following five (5) issues:

1. Whether the Superior Court in 1999 used an incorrect standard for analyzing ineffectiveness of counsel and thus erred in finding none;

2. Whether compulsory and due process rights were violated by the trial court's refusal to permit any defense evidence of DiMeo's sequestration violation, and by its refusal to permit any evidence of Gruby's initial misidentification;

3. Whether due process was violated as a result of prosecutorial misconduct at trial and closing argument;

4. Whether equal protection was denied when the prosecutor allegedly violated the future *Batson* decision; and

5. Whether due process was violated when the prosecutor asked allegedly improper questions of defense witnesses.

On September 23, 1999, the Pennsylvania Supreme Court denied discretionary review. *Commonwealth v. Mims*, 749 A.2d 468 (Pa. 1999) (table).

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Petitioner filed the instant habeas petition on May 22, 2000, raising the following claims:

1. Whether Petitioner's compulsory process and due process rights were violated when the retrial court refused to allow Petitioner to offer testimony questioning the reliability of Commonwealth identification witnesses DiMeo and Gruby;

2. Whether Petitioner's confrontation, due process, and compulsory process rights were violated by the retrial court's rulings regarding the use of Gruby's identification testimony from the first trial;

3. Whether Petitioner's due process rights were violated as a result of prosecutorial misconduct during the retrial; and

4. Whether Petitioner's right to effective assistance of counsel was violated by former counsel's failure to properly preserve and raise issues at trial and on direct appeal.[13]

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13. Petitioner's filings consist of the habeas petition, an eight (8) page insert setting forth grounds and supporting facts for Petitioner's various claims, and a forty-seven (47) page memorandum of law. After Respondents filed a one hundred thirty-two (132) page response to the petition, as well as a thirty-six (36) page "Table of Contents and Factual Appendix" and one (1) volume of exhibits, counsel for Petitioner filed an additional sixty-two (62) page reply brief and three (3) volumes of exhibits. Although Petitioner purports

(Cont'd)

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II. APPLICABLE LAW

A. Timeliness

As a preliminary matter, it is necessary to determine whether Petitioner's habeas petition is time-barred. Since the instant petition was filed on May 22, 2000, it is governed by the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA") which became effective on April 24, 1996. *Hollman v. Wilson*, 158 F.3d 177, 179 (3d Cir. 1998). Section 2244(d) of the AEDPA provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(Cont'd)

to only set forth four (4) grounds for relief, each ground contains numerous sub-parts raising many additional claims. For example, although prosecutorial misconduct and ineffective assistance of counsel are set forth as "ground three" and "ground four," respectively, alleged instances of prosecutorial misconduct and ineffectiveness are also woven into Petitioner's other claims. Therefore, Petitioner's claims have been rephrased for purposes of clarity and analysis. In any event, we believe that the issues presented herein constitute a fair and adequate representation of the issues raised in the petition.

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and is made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

The limitations period provided for in Section 2244(d) of the AEDPA has been construed to allow a one- (1-) year grace period from the date of the statute's effectiveness (April

24, 1996) during which a prisoner could initiate a habeas action, provided that his or her conviction became final before that date. *Burns v. Morton*, 134 F.2d 109, 111 (3d Cir. 1998). Here, Petitioner's original conviction became final on September 30, 1985, which is the date on which the Pennsylvania Supreme Court denied *allocatur* on direct appeal from his judgment of sentence following retrial. Therefore, the one- (1-) year grace period was applicable, and Petitioner would normally have had until April 23, 1997, to file his petition for writ of habeas corpus.

However, Petitioner tolled the running of the one- (1-) year limitations period by filing his PCRA petition on January 11, 1996. 28 U.S.C. § 2244(d)(2). At that time, the original one- (1-) year grace period had not begun to run. When his PCRA petition was denied on June 26, 1997, Petitioner filed a timely appeal. The clock on the limitations period did not begin to run again until September 23, 1999, when the Pennsylvania Supreme Court denied allowance of appeal. Petitioner timely filed the instant petition on May 22, 2000, which was well within the period remaining of the limitations period. Therefore, we find that the petition is not time-barred.

B. Exhaustion And Procedural Default

Although Petitioner presents only four (4) claims, each claim contains numerous parts and sub-parts, some of which overlap, repeat or restate other issues raised in the petition, and some of which are unexhausted and/or procedurally defaulted. Under 28 U.S.C. § 2254(a), a federal court is required to consider only petitions filed on behalf of individuals in custody pursuant to a state court judgment

which are grounded on a violation of the Constitution or the laws or treaties of the United States. *Werts v. Vaughn*, 228 F.3d 178 (3d Cir. 2000). Moreover, a federal court should not entertain a petition for writ of habeas corpus unless the petitioner has first satisfied the exhaustion requirement of 28 U.S.C. § 2254(b)(1), which provides in relevant part that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that — (A) the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A); *Picard v. Connor*, 404 U.S. 270, 275 (1971). "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c); *see O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) ("we ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, i.e., whether he has fairly presented his claims to the state courts") (emphasis in original). "The exhaustion requirement ensures that state courts have the first opportunity to review convictions and preserves the role of state courts in protecting federally guaranteed rights." *Lines v. Larkins*, 208 F.3d 153, 159 (3d Cir. 2000) (quoting *Caswell v. Ryan*, 953 F.2d 853, 856 (3d Cir. 1992)). The habeas petitioner bears the burden of showing that his or her claims have been "fairly presented" to the state courts, and that the habeas claims are the "substantial equivalent" of those presented to the state courts. *Santana v. Fenton*, 685 F.2d 71, 74 (3d Cir. 1982), *cert. denied*, 459 U.S. 1115 (1983).

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The exhaustion requirement may be excused if it would be futile for the petitioner to seek relief in the state court system, or if the particular circumstances of the case render the state process ineffective to protect the petitioner's rights. *Duckworth v. Serrano*, 454 U.S. 1 (1981); *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997) (citing 28 U.S.C. § 2254(b)(1)(B)(i) and (ii)). The Third Circuit has directed federal habeas courts to be cautious in predicting whether a state court would decline to review a claim based on a state procedural bar. *See Doctor v. Walters*, 96 F.3d 675, 681 (3d Cir. 1999) (stating habeas claims are procedurally defaulted "when state law clearly forecloses state court review of the unexhausted claims") (quoting *Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir. 1993)).

Where a petitioner fails to comply with state procedural rules and is barred from litigating a particular constitutional claim in state court, the claim may nevertheless be considered on federal habeas if the petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Teague v. Lane*, 489 U.S. 288, 308 (1988) (plurality opinion). Also, a petitioner may raise a claim in federal habeas proceedings if the state has waived or declined to rely on the procedural default. *See Hull v. Kyler*, 190 F.3d 88, 97 (3d Cir. 1999) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) and *Harris v. Reed*, 489 U.S. 255, 262-63 (1989)).

The issue of cause "ordinarily turn[s] on whether the prisoner can show that some objective factor external to the defense impeded [his] efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Prejudice means that the errors at trial "worked to [petitioner's] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 494 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)). The petitioner bears the burden of establishing cause and prejudice. *Coleman*, 501 U.S. at 749-50.

In order to satisfy the "fundamental miscarriage of justice" exception, the Supreme Court requires that the petitioner show that a "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1985)); *Glass v. Vaughn*, 65 F.3d 13, 16-17 (3d Cir. 1995), *cert. denied*, 516 U.S. 1151 (1996). To satisfy the "actual innocence" standard, a petitioner must show that, in light of new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. *Schlup*, 513 U.S. at 327; *Glass*, 65 F.3d at 16.

C. Standard Of Review For Claims Addressed On The Merits

The AEDPA, which became effective on April 24, 1996, amended the standards for reviewing state court judgments in federal habeas petitions filed under 28 U.S.C. § 2254. *Werts*, 228 F.3d at 195. Since Petitioner filed his habeas petition on May 22, 2000, we are required to apply the

amended standards set forth in the AEDPA to his claims for federal habeas corpus relief. *Id.* (citing *Lindh v. Murphy*, 521 U.S. 320, 336 (1997)).

The AEDPA increases the deference federal courts must give to the factual findings and legal determinations of the state courts. *Werts*, 228 F.3d at 196 (citing *Dickerson v. Vaughn*, 90 F.3d 87, 90 (3d Cir. 1996)). Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, a petition for habeas corpus may only be granted if (1) the state court's adjudication of the claim resulted in a decision contrary to, or involved an unreasonable application of, "clearly established federal law, as determined by the Supreme Court of United States;" or if (2) the adjudication resulted in a decision that was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). Factual issues determined by a state court are presumed to be correct and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. *Werts*, 228 F.3d at 196 (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court expounded upon this language in *Williams v. Taylor*, 529 U.S. 362 (2000). In *Williams*, the Court explained that "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Hameen v. State of Delaware*, 212 F.3d 226, 235 (3d Cir. 2000) (citing *Williams*, 529 U.S. at 389-390). The Court in *Williams* further

stated that "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* The "unreasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* (citing *Williams*, 529 U.S. at 388-389). "In further delineating the 'unreasonable application of' component, the Supreme Court stressed that an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." *Werts*, 228 F.3d at 196 (citing *Williams*, 529 U.S. at 389); *accord Matteo v. Superintendent, SCI Albion*, 171 F.3d 877 (3d Cir. 1999).

III. DISCUSSION

A. Claims Related To The Retrial Court's Refusal To Allow Testimony Concerning The Reliability Of Commonwealth Identification Witnesses DiMeo And Gruby

In "Ground One," Petitioner argues that his due process and compulsory process rights were violated by the retrial court's refusal to permit Petitioner to offer testimony questioning the reliability of Commonwealth identification witnesses DiMeo and Gruby. Specifically, Petitioner argues that the retrial court improperly precluded evidence of DiMeo's sequestration violation that occurred during the first

trial, as well as evidence that Gruby initially misidentified Petitioner during the in-court seated lineup at the first trial.[14] Respondents argue that these claims are procedurally defaulted and, in the alternative, are meritless. .

1. Petitioner's Claim Concerning Evidence Of DiMeo's Sequestration Violation

In the first part of "Ground One," Petitioner argues that Judge Sabo violated Petitioner's compulsory process and due process rights when the judge ruled that Petitioner could not call his original final counsel, the late Barry Denker, Esquire, to testify regarding DiMeo's sequestration violation that occurred during the first trial. Petitioner did not raise the issue of Denker's testimony concerning the sequestration violation on direct appeal from his second conviction. On collateral appeal, Petitioner stated a broad claim that counsel was ineffective for failing to cross-examine DiMeo, and that the trial court violated Petitioner's state and federal rights by excluding defense evidence that the hallway encounter between DiMeo and Petitioner had been suggestive. We find that Petitioner fairly presented this claim to the state courts.[15] Because the state courts

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14. Petitioner also argues that counsel was ineffective for failing to preserve or raise claims related to these issues, and that the Superior Court used "an overly stringent prejudice standard" when evaluating the ineffectiveness claims. We will address these aspects of "Ground One," along with Petitioner's other claims of ineffective assistance of counsel, *supra* at Part III.D.

15. Also, the court notes that if Petitioner were to prevail on his claim that he was denied his right to present evidence regarding

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were fairly presented with this claim, we find that it is exhausted and, therefore, we will reach the merits.

a. Due Process Standard

Due process will be violated where in-court identification testimony is unduly suggestive and creates a substantial risk of unreliable misidentification. *See Neil v. Biggers*, 409 U.S. 188, 198 (1972) (noting general guidelines "as to the relationship between suggestiveness and misidentification"). "[R]eliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1997); *United States v. Emanuele*, 51 F.3d 1123, 1128 (3d Cir. 1995). In *Biggers*, the Supreme Court set forth a five- (5-) factor "totality of the circumstances" reliability test for determining "the likelihood of misidentification which violates a defendant's right to due process": (1) the opportunity of the witness to view the perpetrator at the crime scene; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. 409 U.S. at 199-200.

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an unconstitutionally infirm identification process, then he would be entitled to habeas relief. *See In re Winship*, 397 U.S. 358, 364 (1970) (the fundamental fairness guarantee of the Due Process Clause requires the prosecution to prove beyond a reasonable doubt every element of an offense); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (it is well-established that the due process rights of an accused in a criminal trial includes the right to a fair opportunity to defend against the state's accusations; confront and cross-examine witnesses; and call witnesses in one's own behalf).

b. Compulsory Process Standard

"It is the manifest duty of the courts" to ensure that a criminal defendant be afforded the guarantees of the Fifth and Sixth Amendments, including due process and the right "to have compulsory process for obtaining witnesses in his favor." *United States v. Nixon*, 418 U.S. 683, 711 (1974) (quoting U.S. Const. amend. V). The Compulsory Process Clause protects against a defendant being "arbitrarily denied . . . the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Washington v. Texas*, 388 U.S. 14, 23 (1967). Evaluation of whether a trial court decision to preclude testimony was arbitrary involves separate analyses of a potential witness' capacity to testify, and the relevance of the testimony. *See Id.*

c. Analysis

At retrial, the defense proposed to have Denker testify regarding DiMeo's sequestration violation at the first trial for the purpose of showing that DiMeo's identification of Petitioner had been impermissibly suggestive.[16] Judge Sabo

16. There had been a prior judicial proceeding and finding in 1975 as to the sequestration violation at which Denker himself had testified. (N.T., 4/15/75, 2-37). At that time, Judge Chalfin ruled that there had been a sequestration violation when DiMeo viewed Petitioner in a hallway of the courthouse, but nothing further. The trial judge denied Petitioner's motion for a mistrial, indicating that he would consider what the appropriate procedure would be if the Commonwealth called DiMeo to testify. (N.T., 4/15/75, 35-36). The Commonwealth did not call DiMeo to testify at the first trial.

denied Petitioner's request, ruling that the proposed testimony was unnecessary because DiMeo had identified Petitioner from an array of photographs only two (2) days after the Dubrow's incident, and because DiMeo did not provide an in-court identification of Petitioner during the first trial. Moreover, Judge Sabo wished to avoid confusing the jury with testimony and additional witnesses on the issue of the sequestration violation.[17]

On direct appeal, Petitioner claimed that Judge Sabo erred in refusing to grant an evidentiary hearing on Petitioner's motion to suppress DiMeo's testimony as a result of the sequestration violation. In doing so, Petitioner framed his claim as a state evidentiary matter. The Pennsylvania Superior Court found that Petitioner waived this issue under Pennsylvania Rule of Criminal Procedure 323(b), which requires trial counsel to file a suppression motion within a certain period of time in advance of trial. *Commonwealth v. Mims*, No. 332 Phila. 1983, at 42-43 (Pa. Super. Dec. 14, 1984) (unpublished memorandum). More importantly for our purposes, however, the Superior Court also found this claim to be meritless:

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17. Contrary to Petitioner's suggestion that Judge Sabo precluded *all* evidence of the sequestration violation, the judge repeatedly stated that the defense *could* introduce Denker's version of events by reading from the original trial transcript. (N.T. 11/09/81, 14.21-14.32, 14.36-14.41). Defense counsel chose not to do so. This court also notes that Judge Sabo did not preclude Denker from testifying as to other issues and, in fact, Denker did testify at the retrial. (N.T. 11/10/81, 15.180-15.190).

> Furthermore, appellant's claim is without support in the record. During the first trial, the court ruled that the Commonwealth could ask [DiMeo] to give an in-court identification, although he decided not to ask her. Additionally, the court noted in regard to the alleged sequestration violation that both [DiMeo] and the Detective denied that there was any suggestion made as to the appellant's identity pre-trial in the hallway.

Id. at 43. Thus, the Superior Court ruled that the hallway incident involving DiMeo was not suggestive, and that it was irrelevant for purposes of the retrial.

On collateral appeal, the Superior Court addressed Petitioner's claim that he had been precluded from introducing any evidence of the sequestration incident, treating it as a variant of Petitioner's broad claim of ineffective assistance of counsel. The Superior Court noted that during the judicial proceeding which occurred in 1975, both DiMeo and the detective testified that there was no suggestion made in the hallway at the time of the sequestration violation. The Superior Court then stated:

> Since both the trial and appellate courts concluded there was *no suggestiveness* in the hallway confrontation and identification, the evidence of the encounter would not have aided appellant's defense at the second trial, *particularly in light of the prior photo identifications made by both identification witnesses*.

Commonwealth v. Mims, No. 3094 Phila. 1997, at 5-6 (Pa. Super. Jan. 25, 1999) (unpublished memorandum) (emphasis added).

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Petitioner has failed to established the unreasonableness of the state courts' conclusion that DiMeo's identification testimony was not unduly suggestive, particularly since there had been a judicial proceeding on this issue in 1975 at which Denker himself had testified. In addition, the retrial court's repeated invitation to defense counsel to read the transcript of the 1975 proceeding to the second jury indicates that Judge Sabo sought to limit, but did not preclude, Petitioner's right to offer testimony related to the DiMeo identification. Under the circumstances, therefore, Petitioner has not established that the retrial court arbitrarily denied his right to present relevant and material testimony. As a result, we find that the determination of the state courts is not "contrary to" clearly established Supreme Court precedent regarding due process and compulsory process rights. *See Neil, supra*; *Washington, supra*. Moreover, since the state courts reasonably applied due process and compulsory process principles to the instant case, we find that the state court decisions do not constitute an "unreasonable application" of clearly established federal law. *Williams*, 529 U.S. at 386-389; *Hameen*, 212 F.2d at 246. Accordingly, we find that Plaintiff is not entitled to relief on this aspect of the claim.

2. Petitioner's Claim Concerning Evidence Of The Circumstances Of Gruby's Identification

In the second part of "Ground One," Petitioner argues that Judge Sabo violated Petitioner's compulsory process and due process rights when the judge denied Petitioner's request to elicit testimony concerning the circumstances of Gruby's identification of Petitioner during the first trial. Petitioner did not state this exact claim on direct appeal to the

Pennsylvania Superior Court. Rather, Petitioner raised the issue of whether the retrial court erred in permitting the Commonwealth to introduce Gruby's identification testimony.[18] *Commonwealth v. Mims*, No. 332 Phila. 1983, at 2 (Pa. Super. Dec. 14, 1984) (unpublished memorandum). On collateral appeal, Petitioner claimed that the retrial court erred in precluding Petitioner from presenting any evidence of the circumstances surrounding Gruby's identification of Petitioner at the first trial.[19]

Although presented to the state courts in an overly broad fashion, we nevertheless find the claim to have been fairly presented. *See Chaussard v. Fulcomer*, 816 F.2d 925, 928, (3d Cir. 1987) (federal habeas argument deemed substantially equivalent to challenge made in state court, although the emphasis of argument in state court may have been slightly different). Therefore, we will reach the merits of the claim.

At retrial, Petitioner sought to elicit testimony from Michael O'Connor, the person Gruby initially identified in the courtroom during the first trial, and from Petitioner's original trial counsel, Denker, in order to "present exactly what happened during the first identification of Gruby." (N.T. 11/13/81, 14.30-14.31). Judge Sabo denied Petitioner's

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18. As discussed *supra* in Part III.B, the Superior Court found this claim to be meritless.

19. Because Petitioner did not raise this exact claim on direct appeal, the Superior Court on collateral appeal treated the claim as a variant of ineffective assistance of counsel. The Superior Court found the claim to be meritless. *Commonwealth v. Mims*, No. 3094 Phila. 1997, at 6-7 (Pa. Super. Jan. 25, 1999) (unpublished memorandum).

request. Instead, the judge permitted counsel to read the entire transcript of Gruby's testimony from the first trial, wherein the circumstances of the identification were perfectly clear. Therefore, as with the circumstances surrounding the sequestration violation, Judge Sabo sought to avoid confusing the jury with repetitious and conflicting testimony concerning what had happened in the courtroom during the first trial. (N.T. 11/13/81, 14.30-14.40).

As in the first variant of this claim, we find that Petitioner has not established the unreasonableness of the state courts' decision, or that the trial court arbitrarily denied Petitioner's right to present relevant and material evidence. This is particularly true because, at the time Petitioner made his request to Judge Sabo, he did not offer to prove anything different from what could be learned from the trial transcript. Therefore, denial of the motion did not deny Petitioner fundamental fairness. *See Crane v. Kentucky*, 476 U.S. 683, 689-690 (1986) (holding that, even where state court makes evidentiary error, habeas relief only exists where the evidentiary error is of such magnitude as to deny fundamental fairness). Since the determination of the state courts is not "contrary to" clearly established Supreme Court precedent regarding due process and compulsory process rights, nor an "unreasonable application" of clearly established federal law, we find that Plaintiff is not entitled to relief on this claim. *Williams*, 529 U.S. at 386-389; *Hameen*, 212 F.2d at 246.

Appendix C

B. Claims Related To The Retrial Court's Rulings On The Use Of Gruby's Identification Testimony From The First Trial

In "Ground Two," Petitioner argues that his confrontation, due process and compulsory process rights were violated when the retrial judge conditioned the admissibility of Gruby's initial misidentification of Petitioner during the first trial on defense counsel agreeing to the admission of Gruby's subsequent identification of Petitioner.[20] Respondents counter that this claim is meritless.

The Confrontation Clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; *Idaho v. Wright*, 497 U.S. 805, 813 (1990). Because Gruby had been murdered after the first trial, his identification testimony could only be presented at the retrial through the introduction of his former testimony. Prior to the retrial, Petitioner filed a motion to suppress Gruby's identification testimony. Judge Marshall granted Petitioner's motion, suppressing listed lines of testimony. The Pennsylvania Superior Court summarized what happened next:

> On retrial, [Petitioner] sought to introduce the original incorrect identification. The court ruled

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20. Petitioner's argument that counsel was ineffective for agreeing to this arrangement, and for failing to preserve and raise this claim, will be addressed supra at Part III.D. Likewise, Petitioner's argument that these alleged errors were "exacerbated" by prosecutorial misconduct will be addressed supra at Part III.C.

> that if [Petitioner] introduced the evidence from the notes of testimony from the first trial as to misidentification, as the witness and his wife had been assassinated after the first trial, the Commonwealth could show the subsequent identification.

Commonwealth v. Mims, No. 332 Phila. 1983, at 33 (Pa. Super. Dec. 14, 1984) (unpublished memorandum). Thus, Judge Sabo agreed to allow evidence of the misidentification on condition that *all* of Gruby's identification testimony be read into the record, including the subsequent identification of Petitioner. The judge also required that the following conditions be satisfied: (1) all of the parties agreed to the all-or-nothing arrangement; (2) Petitioner expressed his understanding of the arrangement; and (3) all of the statements made by Judge Chalfin during Gruby's identification testimony at the first trial would be read by the district attorney, and not by Judge Sabo, in order to avoid the identical type of judicial advocacy which the Pennsylvania Supreme Court found to be improper at the first trial. (N.T. 11/13/81, 6-29.)

We must first determine whether the decisions of the state courts are "contrary to" clearly established Supreme Court precedent regarding due process, compulsory process, and confrontation clause rights. On direct appeal, the Pennsylvania Superior Court stated:

> [Petitioner] is incorrect in his contention that the court should have allowed only the sworn testimony of the incorrect identification. The trial

> court correctly ruled that the Commonwealth could rebut this evidence with the subsequent identification. Such rebuttal testimony would be proper because it would be designed to prevent the jury from being misled. The court ruled that the notes of testimony from the first trial could be read to the jury, however, the section where the [Pennsylvania] Supreme Court ruled that the court incorrectly intervened by questioning the witness would be read with the prosecutor asking the questions that led to Mr. Gruby's identification of [Petitioner]. This ruling corrected the harm to [Petitioner] at the first trial. The Supreme Court's reasoning indicates that it was the fact of the court's intervention in the role of advocate that was objectionable, not the questions themselves.

Commonwealth v. Mims, No. 332 Phila. 1983, at 33-34 (Pa. Super. Dec. 14, 1984) (unpublished memorandum) (citations omitted). Therefore, the Superior Court held that Gruby's "identification was not so impermissibly suggestive as to render the subsequent identification inadmissible." *Id.* at 32-33.

In conditionally allowing the defense to present evidence that Gruby misidentified Petitioner at the first trial, Judge Sabo sought to balance the rights of the parties in such a way as to avoid misleading the jury and/or repeating the improper actions of the original trial judge. Petitioner has failed to establish that Judge Sabo's ruling was unreasonable or arbitrary under the peculiar circumstances of this case. Therefore, we find that the determination of the state courts

is not "contrary to" clearly established Supreme Court precedent regarding due process compulsory process, and confrontation clause rights. *See Neil*, *supra*; *Washington*, *supra*; *Wright*, *supra*. Moreover, since the state courts reasonably applied constitutional principles to the instant case, we find that the state court decisions do not constitute an "unreasonable application" of clearly established federal law. *Williams*, 529 U.S. at 386-389; *Hameen*, 212 F.2d at 246. Accordingly, we find that Plaintiff is not entitled to relief on this claim.

C. Prosecutorial Misconduct

In "Ground Three," Petitioner argues that his due process rights were violated as a result of numerous instances of prosecutorial misconduct during the presentation of evidence, and during closing argument.[21] Respondents argue that most of these claims are procedurally defaulted and that, in any event, all of Petitioner's prosecutorial misconduct claims are meritless.

The Supreme Court "has recognized that prosecutorial misconduct may 'so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process.'" *Greer v. Miller*, 483 U.S. 756, 765 (1987) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); *Darden v. Wainwright*, 477 U.S. 168 (1986). To constitute a due process

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21. Petitioner also argues that counsel was ineffective for failing to preserve or raise claims related to alleged prosecutorial misconduct. Again, we will address this aspect of "Ground Three," along with Petitioner's other claims of ineffective assistance of counsel, *supra* at Part III.D.

violation, the prosecutorial misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *Greer*, 483 U.S. at 765 (citation omitted) (quoting *United States v. Agurs*, 427 U.S. 97, 108 (1976)); *Smith v. Phillips*, 455 U.S. 209, 211 (1982); *see also Ramseur v. Beyer*, 983 F.2d 1215, 1239 (3d Cir. 1992) (stating court must distinguish between ordinary trial error and egregious conduct that amounts to a denial of due process). The alleged misconduct must be viewed in the context of the entire proceedings.[22] *Donnelly*, 416 U.S. at 643; *Keo v. Klem*, 2000 WL 1224900, at *2 (E.D. Pa. Aug. 30, 2000).

1. Cross-Examination About Witness Names

Petitioner first claims that the prosecutor violated his due process rights by cross-examining several defense witnesses, who were black Muslims, by questioning them about the Muslim practice of changing names upon conversion to Islam. In essence, Petitioner argues that the prosecutor attempted to prejudice the jury against him by reason of his race and religion. Respondents argue that this

22. In his memorandum filed in support of this habeas petition, Petitioner strongly implies that this court should find prosecutorial misconduct because the prosecutor in this case, Barbara Christie, Esquire, "has a long history of intentional, persistent misconduct in cases where she has been trial counsel." *See* Pet'r Br. at 24-25. Petitioner's broad assault on the professional character of this prosecutor is irrelevant for purposes of our inquiry because this court is limited to the record in *this* case. In any event, as the Supreme Court has stated, "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 217 (1981).

claim is procedurally defaulted and, in any event, is meritless.[23]

On direct appeal, Petitioner raised only the religious variant of this claim, which the Pennsylvania Superior Court found to be meritless under state law. *Commonwealth v. Mims*, No. 332 Phila. 1983, at 15-23 (Pa. Super. Dec. 14, 1984) (unpublished memorandum). Specifically, the Superior Court found that where the prosecutor touched upon the Muslim religion during cross-examination, she did so in order to legitimately counter testimony elicited by the defense for the purpose of showing Petitioner's strong affiliation with members of the Nation of Islam, who provided Petitioner's alibi. *Id.* at 15-17.

Although Petitioner did not raise this claim in his PCRA petition, he included it in the brief submitted to the Superior Court on appeal from the denial of post-conviction relief, where for the first time he tacked "racial" onto the previously raised "religious" claim. In discussing this claim, the Superior Court stated:

> [Petitioner] also contends the prosecutor improperly appealed to religious and racial prejudice by making reference to the Muslim

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23. Respondents split this claim into its racial and religious variants, and argue that each is procedurally defaulted for different reasons. Because this claim does not implicate separate and distinct legal issues, we will analyze the racial and religious aspects together. *See James v. Superintendent of SCI-Huntingdon*, 1998 WL 531837, at *2 n.4 (E.D. Pa 1998) (citing *Brewer v. Williams*, 430 U.S. 387, 403 (1977)) (noting it is impermissible for the court to split single habeas claims and to conduct separate exhaustion analyses for each).

> religion, questioning defense witnesses about their Muslim names, and attempting to elicit sympathy for the victims. These claims were addressed by this Court on direct appeal; therefore, they cannot serve as a basis for PCRA relief, having been previously litigated and found to be meritless. *See* 42 Pa.C.S. § 9544(a)(3).

Commonwealth v. Mims, No. 3094 Phila. 1997, at 9 (Pa. Super. Jan. 25, 1999) (unpublished memorandum).

Where the petitioner has presented his claims in the Pennsylvania state courts, federal courts will not, review a state court decision involving a question of federal law if the state court decision is based on state law, even a state procedural law, that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 727-31 (1991). As the Supreme Court has explained, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism:

> In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.

Edwards v. Carpenter, 529 U.S. 446, 452 (2000) (citing *Coleman*, 501 U.S. at 732).

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In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to a state procedural rule, federal habeas review of the claims is barred unless the petitioner can demonstrate cause for the default and actual prejudice resulting therefrom. *Coleman*, 501 U.S. at 750; *Murray v. Carrier*, 477 U.S. 478 (1986); *see also Sistrunk v. Vaughn*, 96 F.3d 666, 673 (3d Cir. 1996). The "cause and prejudice" standard applies whether the default in question occurred at trial, on appeal, or on state collateral attack. *Edwards*, 529 U.S. at 452. Here, Petitioner attempts to show cause and prejudice for any potential default by arguing that former counsel was ineffective. *See, e.g.*, Petr's Traverse at p. 48. Error on the part of counsel may rise to the level of ineffectiveness and thereby excuse a procedural default, provided that the ineffectiveness claim was independently presented to the state courts prior to its use to establish cause. *See, e.g., Tran v. Gillis*, 1999 WL 962539, at *6 (E.D. Pa. Oct. 21, 1999) (citing *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986)). As discussed *infra*, Petitioner presented ineffectiveness claims to the state courts only in the most overly broad and vague manner and, therefore, Petitioner has failed to demonstrate cause for any default.[24] In addition, Petitioner has failed to show that failure to excuse the default will result in a fundamental miscarriage of justice. Therefore, we find this claim to be procedurally defaulted. *Schlup*, 513 U.S. at 327; *Coleman*, 501 U.S. at 750.

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24. In any event, since we find that Petitioner's underlying substantive claims lack merit, Petitioner has failed to show actual prejudice. *See Coleman*, 501 U.S. at 750 (default excused by showing cause for the default and actual prejudice).

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Even were this claim not deemed to be procedurally defaulted, we find that the Superior Court properly found that the claim lacks merit. The prosecutor did not characterize any witness as good or bad based upon race or religion, nor did she raise the issues of race or religion during trial. Rather, references to the Muslim religion were elicited by Petitioner's trial counsel in order to show Petitioner's affiliation with individuals associated with the Nation of Islam, several members of which provided Petitioner's alibi. (N.T. 11/05/81, 13.64-13.72). Moreover, during the course of the direct examination of witness Abass Rassoull, it was defense counsel who elicited a detailed explanation of the significance and origin of Muslims changing names upon conversion, apparently to explain why Petitioner had aliases at the time of his arrest. (N.T. 11/09/81, 14.141-143). On cross-examination, the prosecutor began by asking each alibi witness to confirm their identity by giving their present, Muslim name, as well as their pre-conversion name. Since the jury was made aware of Petitioner's religious affiliation, and the Muslim practice of name changes, by way of Petitioner's own alibi evidence, the prosecutor's questioning of defense witnesses regarding their identity, as well as references to persons who had not changed their names, cannot be considered prejudicial.

We find that the determination of the state courts is not "contrary to" the clearly established federal law as set forth by the Supreme Court in cases governing claims of prosecutorial misconduct. *See Greer*, *supra*; *Darden*, *supra*. Moreover, since the state courts reasonably applied due process principles to the instant case, we find that the state court decisions do not constitute an "unreasonable

application" of clearly established federal law. *Williams*, 529 U.S. at 386-389; *Hameen*, 212 F.2d at 246. Accordingly, this claim must be denied.

2. Questioning Of Defense Witnesses Regarding Other Crimes

Petitioner claims that the prosecutor improperly questioned defense witnesses regarding other crimes. Specifically, Petitioner claims that the prosecutor: (1) improperly questioned George Schuler about his prior arrests; (2) displayed witness "mug shots" to the jury; and (3) improperly cross-examined Rudolph Ali as to whether he had been hiding in the basement of a Muslim bakery when the police arrived looking for Petitioner. We will address each of these claims seriatim.

a. Questioning George Schuler About Prior Arrests

Petitioner first claims that the prosecutor improperly questioned defense witness George Schuler about his prior arrests.[25] Petitioner raised this claim on direct appeal, citing only state law. The Pennsylvania Supreme Court found the claim to be meritless, also on state law grounds. *Commonwealth v. Mims*, No. 332 Phila. 1983, at 13-15 (Pa. Super. Dec. 14, 1984) (unpublished memorandum). In his subsequent PCRA petition, Petitioner set forth a lengthy due process claim which included a reference that the

25. Petitioner raises this issue in an eight- (8-) page "Insert" to his habeas petition; he does not develop this claim in his memorandum.

prosecutor "questioned Schuler about prior arrests." *See* Pet'r PCRA Pet. at 11. However, Petitioner did not develop this claim in his memorandum to the PCRA court, did not discuss it in his brief to the Pennsylvania Superior Court, and did not include it in his petitioner for allowance of appeal to the Pennsylvania Supreme Court. Accordingly, we find that the federal variant of this claim is unexhausted.

Unexhausted habeas claims are procedurally defaulted "when state law clearly forecloses state court review of the unexhausted claims." *Doctor v. Walters*, 96 F.3d 675, 681 (3d Cir. 1998) (citing *Toulson v. Beyer*, 987 F.2d 984, 987 (3d Cir. 1993)). Under Pennsylvania law, the PCRA requires petitioners whose convictions became final before January 16, 1996, to file any PCRA petitions within one (1) year of that date. *See* 42 Pa. Cons. Stat. Ann. § 9545(b); *Commonwealth v. Fahy*, 737 A.2d 214, 218 (Pa. 1999). Petitioner's convictions became final in 1985. Although he filed one (1) timely PCRA petition on January 11, 1996, he had until January 15, 1997, to file a second timely PCRA petition. Petitioner did not do so. Therefore, Pennsylvania law clearly forecloses state court review of Petitioner's unexhausted claim. *See Lines v. Larkins*, 208 F.3d 153, 164 (3d Cir. 2000) (stating "it is now clear the one year limitation applies to all PCRA petitions including a second petition, no matter when the first was filed"). Because pursuit of state remedies is futile, exhaustion will be excused. *Id.* at 164-166. Nevertheless, this claim is procedurally defaulted. *See Carrier*, 477 U.S. at 488. Since Petitioner has failed to demonstrate cause and prejudice for the default, the state procedural bar constitutes an independent and adequate ground which forecloses federal habeas review. *See Gray v.*

Netherland, 518 U.S. 152, 161-162 (1996); *Banks v. Horn*, 126 F.3d 206, 211 (3d Cir. 1997).[26]

b. "Mug Shots"

Petitioner next claims that the prosecutor improperly showed the jury "mug shots" of defense witnesses. In questioning defense witnesses, the prosecutor looked at file folders containing information on each witness, some of which contained arrest photos. Petitioner's counsel objected several times, claiming that the prosecutor either inadvertently or deliberately showed the photos to the jury.

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26. In any event, the record clearly shows that it was Schuler, and not the prosecution, who raised the issue of his prior arrests by spontaneously stating that the police frequently came to his house and that he had once been arrested. (N.T. 11/05/81, 13.177-13.180). At the time of his spontaneous statement, Schuler denied that he remembered giving the police a statement that he had seen Petitioner in Philadelphia two (2) weeks after the Dubrow's incident. The prosecutor followed Schuler's statement by asking about other arrests in order to show that Schuler had reason to remember other contacts with the police. Under Pennsylvania law, a witness may not offer as an excuse for his conflicting testimony to the police and to the court that he could not remember, nor can such an excuse be used to preclude cross-examination to show whether or not the witness was credible. *See Commonwealth v. Clark*, 311 A.2d 910, 914 (Pa. 1973). The Pennsylvania Superior Court denied relief on that ground, and noted that the trial court's instruction to the prosecutor to "move on" in questioning was within its sound discretion. *Commonwealth v. Mims*, No. 332 Phila. 1983, at 13-15 (Pa. Super. Dec. 14, 1984) (unpublished memorandum). Were we to address the merits of this claim, therefore, we would find that the decision of the state courts was not contrary to, or an unreasonable application of, United States Supreme Court precedent. 28 U.S.C. § 2254(d).

The judge overruled the objections. Petitioner raised the "mug shot" claim on direct appeal, where the claim was solely asserted, and decided, on state law grounds. On collateral appeal, the Pennsylvania Superior Court stated that the claim "[was] addressed by this Court on direct appeal and [was] found meritless." *Commonwealth v. Mims*, No. 3094 Phila. 1997, at 9 (Pa. Super. Jan. 25, 1999) (unpublished memorandum). Although the federal variant of this claim is unexhausted, exhaustion will be excused because Petitioner no longer has an available state remedy. *See* 42 Pa. Cons. Stat. Ann. § 9545(b); *Larkins*, 208 F.3d at 164-166. Nevertheless, this claim is procedurally defaulted. *See Carrier*, 477 U.S. at 488. Since Petitioner has failed to demonstrate cause and prejudice for this default, the court's decision constitutes an independent and adequate ground which forecloses federal habeas review. *Gray*, 518 U.S. at 161-162; *Banks*, 126 F.3d at 211.

In any event, the Pennsylvania Superior Court accepted the trial court's finding of fact that the prosecutor had not "held up" any of the photos within view of the jury. *Commonwealth v. Mims*, No. 332 Phila. 1983, at 8-9 (Pa. Super. Dec. 14, 1984) (unpublished memorandum). Federal habeas courts are required to presume that the state court findings of fact, including those of an appellate court, are correct. 28 U.S.C. § 2254(e)(1); *Sumner v. Mata*, 449 U.S. 539 (1981). Accordingly, Petitioner's "mug shot" claim is both procedurally defaulted and meritless.

c. Questioning of Rudolph Ali About Hiding

Petitioner also claims that the prosecutor improperly questioned defense witness Rudolph Ali as to whether he had been hiding in the basement of a Muslim bakery when the police arrived looking for Petitioner, thereby suggesting that he was a criminal. Again, this claim was only raised by Petitioner on direct appeal, and only on state law grounds. The Pennsylvania Superior Court found the claim to be meritless, also under state law. *Commonwealth v. Mims*, No. 332 Phila. 1983, at 11-13 (Pa. Super. Dec. 14, 1984) (unpublished memorandum). Therefore, we find that this claim is procedurally defaulted by operation of the adequate and independent state law doctrine, *Coleman*, *supra*, and Petitioner has neither showed cause and prejudice to overcome the default, nor a miscarriage of justice.[27] Accordingly, we find that this claim must be dismissed.

3. Statements Regarding Petitioner's Arrest In Chicago

Petitioner next claims that the prosecutor violated his due process rights when he told the jury that Petitioner had

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27. In discussing the merits, the Superior Court that the prosecutor's questions were proper because she was attempting to ascertain the facts referred to by defense counsel on direct examination regarding Ali's whereabouts at the time of Petitioner's arrest. Also, the Superior Court found that the trial court did not abuse its discretion in determining whether the questions were so inflammatory as to require a new trial. *Commonwealth v. Mims*, No. 332 Phila. 1983, at 11-13 (Pa. Super. Dec. 14, 1984) (unpublished memorandum). We conclude that the decision of the state courts was not contrary to, or an unreasonable application of, United States Supreme Court precedent. 28 U.S.C. § 2254(d).

been arrested by the FBI in Chicago for the Dubrow's crime, when Petitioner's original trial counsel, Denker, testified during the retrial that Petitioner had voluntarily surrendered to a Philadelphia judge. Petitioner asserted this claim on collateral appeal but not on direct appeal.[28] On collateral appeal, the Pennsylvania Superior Court stated:

> [Petitioner] claims the prosecutor stigmatized him by referring to facts such as . . . his 1974 arrest in Chicago. . . . Having reviewed the record, we find nothing improper in the prosecutor's references to these facts. [Petitioner's] argument is essentially an attack on the admissibility of this evidence, not the prosecutor's reference to it.
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> * * * *
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> Even viewed in an evidentiary context, [Petitioner's] claims are meritless. All of the evidence of which he complains was relevant, and much of it was elicited in fair response to disclosures by [Petitioner] during cross-examination.

Commonwealth v. Mims, No. 3094 Phila. 1997, at 7-8 (Pa. Super. Jan. 25, 1999) (unpublished memorandum). Thus, the Superior Court treated this claim solely as a state

28. On direct appeal, Petitioner asserted that the trial court erred under state law by admitting evidence of his flight to Chicago, and the Superior Court resolved the issue solely on state law grounds. *Commonwealth v. Mims*, No. 332 Phila. 1983, at 47 (Pa. Super. Dec. 14, 1984) (unpublished memorandum).

law claim, applying state evidentiary law. Accordingly, we find that this claim is procedurally defaulted by operation of the independent and adequate state ground doctrine. *Coleman*, *supra*. Petitioner has neither shown cause and prejudice to overcome the default, nor a miscarriage of justice, and therefore this claim must be dismissed.[29]

4. Statements Regarding Petitioner's Time And Money

Petitioner testified that he lacked money to prove his alibi in Chicago, and lacked time to get the information

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29. Petitioner also faults the prosecutor for not eliciting evidence that the Chicago arrest was for a different offense, namely, the Exton bank robbery which occurred shortly after the Dubrow's incident. Notably, however, the prosecutor apparently decided not to mention the Exton bank robbery during the retrial in order *not* to prejudice Petitioner. In fact, the only reference to the robbery occurred when defense witness Millard Frazier, one (1) of Petitioner's landlords, spontaneously stated that he had been questioned by the FBI in 1971 because they wanted Petitioner for a bank robbery. (N.T. 11/09/81, 14.106).

Moreover, although Petitioner was arrested in Chicago by the FBI on the bank robbery warrant, a state murder warrant for Petitioner remained outstanding. For reasons unknown, a Chicago-based United States Magistrate Judge released Petitioner on his posting the full amount of a $20,000 bond, after which he was apparently required to report either to the FBI in Philadelphia, or to the United States District Court in Philadelphia, which Petitioner subsequently did accompanied by his attorney. In any event, it defies credulity that Petitioner would have voluntarily turned himself into Philadelphia authorities in October 1974 — for which he had been wanted for more than three (3) years — had it not been for his arrest in Chicago by the FBI on the bank robbery in September 1974.

because he went to trial immediately. Petitioner claims that the prosecutor violated his due process rights when she elicited the fact that, at the time of his arrest, Petitioner had $1,000 in his pocket, owned a Cadillac, and that he was eventually released on $150,000 bail. Although these facts were true, Petitioner alleges that this was a calculated effort on the part of the prosecutor "to inflame the passions of the jury through class prejudice and to suggest other criminal activity." *See* Pet'r Br. at 30. Respondents argue that this claim is procedurally defaulted and meritless.

Petitioner did not raise this claim on direct appeal. Rather, he included a variant of this claim on collateral appeal, where the claim was presented, and decided, entirely under state law. On collateral appeal, the Superior Court ignored the waiver of this claim and addressed it on the merits, finding it to be an attack on the admissibility of the evidence and not on the prosecutor's reference to it. *Commonwealth v. Mims*, No. 3094 Phila. 1997, at 7-8 (Pa. Super. Jan. 25, 1999) (unpublished memorandum). As with the claim regarding Petitioner's arrest in Chicago, the Superior Court found "nothing improper in the prosecutor's reference" to Petitioner's indicia of wealth, particularly as the evidence was "elicited in fair response" to his own testimony. *Id.* at 8. Accordingly, we find that this claim is procedurally defaulted by operation of the independent and adequate state ground doctrine. *Coleman, supra.* Because Petitioner has neither shown cause and prejudice to overcome the default, nor a miscarriage of justice, this claim must be dismissed.

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5. Statements Regarding Petitioner's Waiver Of His Preliminary Hearing

Petitioner next claims that the prosecutor violated his due process rights by asking him why he waived a preliminary hearing. As with his previous claim, Petitioner did not raise this claim on direct appeal but did so on collateral appeal. Again, the Pennsylvania Superior Court viewed this claim as a variant of a state evidentiary admissibility claim, and resolved it entirely on those grounds. *Commonwealth v. Mims*, No. 3094 Phila. 1997, at 15-16 (Pa. Super. Jan. 25, 1999) (unpublished memorandum). Accordingly, we find that this claim is procedurally defaulted by operation of the independent and adequate state ground doctrine. *Coleman*, *supra*. Petitioner has neither shown cause and prejudice to overcome the default, nor a miscarriage of justice, and therefore this claim must be dismissed.[30]

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30. Alternatively, Petitioner's federal claim arising from the prosecutor's mention of the waiver of a preliminary hearing is unexhausted and therefore defaulted for the reasons discussed *supra* at Part III.C.2. However, even if the federal variant of this claim were deemed exhausted, the claim is meritless. Petitioner himself brought up the subject of his preliminary hearing, and Petitioner's counsel implied that DiMeo had failed to identify Petitioner at a preliminary hearing. (N.T. 11/02/81, 11.143-11.145). On cross-examination, the prosecutor brought out that the reason DiMeo had not identified Petitioner at a preliminary hearing was that Petitioner had waived that right. (N.T. 11/12/81, 16.200-16.202). At side-bar, counsel for Petitioner admitted that he had mistakenly allowed Petitioner's false testimony regarding a preliminary hearing to stand, and he stipulated that there had been no preliminary hearing. (N.T. 11/12/81, 16.207-16.208). We find that the determination of the state courts is not "contrary to," or an unreasonable application of, clearly established federal law. *Williams*, 529 U.S. at 386-389. Therefore, Petitioner's claim must fail.

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6. Statements Made During Closing Argument

Petitioner next argues that his due process rights were violated as a result of numerous instances of prosecutorial misconduct during closing argument. Specifically, Petitioner argues that the prosecutor violated his rights in that she: (1) disparaged Petitioner's right to put on a defense; (2) denigrated the presumption of innocence; (3) mentioned Petitioner's waiver of his preliminary hearing; (4) stated that Petitioner attempted to fool Gruby with decoys during an in-court seated line-up at the first trial; (5) appealed to religious and racial prejudice; and (6) improperly appealed to emotion.

a. Right to put on a defense

Petitioner first claims that the prosecutor disparaged Petitioner's right to put on a defense when the prosecutor stated that if the Commonwealth's witnesses were as unbelievable as the defense claimed, "why put on a defense at all?" (N.T. 11/17/81, at 19.168). Although we find that this claim is exhausted, we also find it meritless. On collateral review, the Pennsylvania Supreme Court observed that "in the context of defense counsel's closing argument, which understandably attacked the credibility of the Commonwealth's witnesses, the prosecutor's statement was fair response; [Petitioner's] claim rings hollow." *Commonwealth v. Mims*, No. 3094 Phila. 1997, at 8 (Pa. Super. Jan. 25, 1999) (unpublished memorandum). Upon review of the record, it is clear that the prosecutor was fairly responding to the defense argument that the Commonwealth's identification evidence was weak and that, even without putting on a defense, the case was fraught with reasonable

doubt. (11/17/81, 19.31-19.33, 19.44, 19.168). Therefore, we find that the determination of the state courts is not "contrary to," or an unreasonable application of, clearly established federal law. *Williams*, 529 U.S. at 386-389. Therefore, Petitioner is not entitled to relief on this claim.

b. Denigration of presumption of innocence

Petitioner next claims that the prosecutor denigrated Petitioner's right to be presumed innocent until proven guilty. In response to references by both defense attorneys to the "shroud" or "cloak of innocence" in their summations, the prosecutor stated:

> Ladies and gentleman, I tell you one thing. The presumption of innocence means just that. It is a cloak to protect the truly innocent. It is not a shield behind which the guilty can hide, and it is at the point of deliberations when you ladies and gentlemen go back into that back room and sift through the evidence that you have heard in this case, you are to strip that presumption not by any bias or prejudice or sympathy or fantasy, but by cold, hard evidence, to strip that presumption of innocence and expose the truly guilty to justice.

(N.T. 11/17/81, 19.132-19.132). When Petitioner raised this claim on direct appeal, the Superior Court found that the claim had been waived because no objection had been raised

at trial.[31] *Commonwealth v. Mims*, No. 332 Phila. 1983, at 27 (Pa. Super. Dec. 14, 1984) (unpublished memorandum). Although Petitioner raised the issue again on collateral appeal, the Superior Court declined to review the claim. *See Commonwealth v. Mims*, No. 3094 Phila. 1997, at 8 (Pa. Super. Jan. 25, 1999) (unpublished memorandum). Therefore, we find that this claim is procedurally defaulted by operation of the adequate and independent state ground doctrine.[32] *See Coleman*, *supra*. Because Petitioner has neither shown cause and prejudice to overcome the default, nor a miscarriage of justice, this claim must be dismissed.

c. Waiver of right to preliminary hearing

Petitioner next claims that the prosecutor violated his rights by improperly stating during closing argument that Petitioner had waived his right to a preliminary hearing. This is a variant of Petitioner's claim, discussed *supra*, that the prosecutor violated his rights by mentioning his waiver of a preliminary hearing during the presentation of evidence. Trial counsel did not object to the prosecutor's statement, and Petitioner did not raise the issue on direct appeal.

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31. The Superior Court added: "The prosecutor gave a correct statement of the application of the presumption of innocence and how it may be overcome." *Commonwealth v. Mims*, No. 332 Phila. 1983, at 27 (Pa. Super. Dec. 14, 1984) (unpublished memorandum).

32. In any event, since the argument was responsive to defense counsel's closing, constituted proper argument on the law, and the jury was properly instructed on the point, (N.T. 11/18/81, 20.37), Petitioner's claim would also fail on the merits.

Nevertheless, Petitioner presented the claim on collateral appeal. In rejecting the claim, the Superior Court stated:

> [Petitioner] repeats his argument concerning the prosecutor's reference to his waiver of a preliminary hearing. [Petitioner] tried to convince the jury [that] he had been denied the opportunity to confront the witness at the preliminary hearing, when in fact there had been no hearing because he had waived it. Therefore, the prosecutor's statement was fair rebuttal.

Commonwealth v. Mims, No. 3094 Phila. 1997, at 9 (Pa. Super. Jan. 25, 1999) (unpublished memorandum). Clearly, Petitioner opened the door to references to a preliminary hearing and, as a result, the state court properly determined that the prosecutor's closing statements were in fair response. We find that the determination of the state courts is not "contrary to," or an unreasonable application of, clearly established federal law. *Williams*, 529 U.S. at 386-389. Therefore, Petitioner is not entitled to relief on this claim.

d. Petitioner's use of "clones" to "fool" Gruby

Petitioner next claims that the prosecutor violated his rights when she stated that Petitioner had attempted to "fool" Gruby with "clones" during the in-court seated line-up at the first trial.[33] On direct appeal, the Pennsylvania Superior

33. Respondents counter that this claim is impermissibly vague because Petitioner cites many lengthy portions of the prosecutor's (Cont'd)

Court addressed Petitioner's claim that the prosecutor improperly referred to "clones" during closing argument. *See Commonwealth v. Mims*, No. 332 Phila. 1983, at 28-29 (Pa. Super. Dec. 14, 1984) (unpublished memorandum). The Superior Court found the claim waived, then noted that the prosecutor's argument was supported by a witness who stated that some of the men in the lineup looked similar.[34] *Id.* at 29. As a result, the state court concluded that the prosecutor's argument was permissible "in the context of the entire case." *Id.*

(Cont'd)
closing argument without specifying what his claim is as to each cited section or page. As a result, Respondents identify each allegedly improper statement apparently referenced by Petitioner, and then argue that since Petitioner's claim as to each of these statements, standing alone, is defaulted, the entire claim is also defaulted. This Court finds that Petitioner fairly presented this issue on direct appeal, and otherwise raised prosecutorial misconduct during closing on both direct and collateral appeal. Therefore, we will reach the merits of this claim. *See O'Sullivan*, 526 U.S. at 848 (1999) (requiring petitioner to fairly presented claims to the state courts); *Keller v. Larkins*, 89 F.Supp. 593, 598 (E.D. Pa. 2000) (stating court will consider merits of due process claim where petitioner "consistently referred to his right to a fair trial in terms specific enough to consider this claim exhausted"). Moreover, as noted previously, it is impermissible for the court to dissect single habeas claims and to conduct separate exhaustion analyses for each portion thereof. *See James*, 1998 WL 531837, at *2 n.4. In any event, we agree with Respondents' alternative argument that the claim is meritless.

34. Although Petitioner states that there is no evidentiary support for the claim that Gruby viewed sixteen (16) "clones," *See* Pet'r Bf, at 33, the trial judge stated during a conference in chambers that "[Petitioner] was seated with other people who look similar to himself in race, complex and size." (N.T. 4/17/75, 377).

During closing, the prosecutor emphasized that although Gruby had initially failed to identify Petitioner out of the sixteen (16) black men seated in the first two (2) rows of the courtroom, he did so after the men were instructed to stand. The prosecutor criticized the tactics used by the defense in carrying out the in-court lineup, characterizing it as an attempt to "fool" Gruby with "clones." (N.T. 11/17/81, 19.144-19.149). The prosecutor also compared the Gruby procedure, which occurred in court four (4) years after the Dubrow's incident, with a "fair lineup" such as would be conducted by the police. She concluded the discussion of Gruby's identification with the statement:

> [Gruby] got down there. He looked closer. He saw the same line that you see across the defendant's forehead, and he saw the broken nose, or the indentation across the nose, and he saw the protruding ears. Mr. Gruby was not fooled.

(N.T. 11/17/81, 19.149).

We find that the prosecutor's statements constituted proper argument in the context of this case. The prosecutor was responding to allegations made by the defense in its closing that Gruby had been "brainwashed" into identifying Petitioner at the first trial. (N.T. 11/17/81, 19.86-19.94). Thus, the prosecutor countered by emphasizing the circumstances under which Gruby misidentified, and then identified, Petitioner.[35] As such, we find Petitioner's claim to be

35. Petitioner also argues that the prosecutor's closing was improper because the prosecutor knew her argument was "directly contrary" to the prior finding of the Pennsylvania Supreme Court. According to Petitioner, the state supreme court had found that the

(Cont'd)

meritless and conclude that the state court's rejection of this claim was not contrary to, nor an unreasonable application, of clearly established federal law. *Williams*, 529 U.S. at 386-389. Therefore, Petitioner is not entitled to relief on this claim.

e. Appeal to racial and religious prejudice

Petitioner next claims that the prosecutor improperly appealed to religious and racial prejudice during closing argument when she pointed out that, unlike Petitioner, neither the person murdered in Dubrow's nor his widow (the "Barkers") changed their names. This is a variant of Petitioner's claim, discussed *supra*, that the prosecutor injected prejudice into the trial when she cross-examined defense witnesses about name changes on conversion to Islam.

Defense counsel did not object at trial to the prosecutor's closing remark about the Barkers not having changed their names. As discussed *supra*, Petitioner raised only the religious variant of his prejudice claim on direct appeal,

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(Cont'd)
questioning of Gruby, and the identification of Petitioner by Gruby on the second try, had been unduly suggestive. *See* Pet'r Br. at 33-34. As noted *supra* in Part III.B, we disagree with this characterization of the holding in *Mims*. Rather, what the state supreme court found to be unduly suggestive was not the identification procedure itself, but the *judge's improper interjection* into the identification procedure. *See Mims*, 392 A.2d at 1292-1293 (emphasis added). This Court again notes that, although Gruby's testimony from the first trial was read into the record at the second trial, Judge Sabo did not permit any evidence of the improper judicial intervention to reach the jury.

arguing that the prosecutor improperly appealed to religious prejudice during cross-examination and closing argument. The Pennsylvania Superior Court found the claim to be meritless. *Commonwealth v. Mims*, No. 332 Phila. 1983, at 15-23 (Pa. Super. Dec. 14, 1984) (unpublished memorandum). When Petitioner included a broader "religious and racial prejudice" claim on collateral appeal, the Superior Court stated that the claims had been addressed on direct appeal, were previously litigated and found to be meritless, and therefore could not serve as a basis for PCRA relief.[36] *Commonwealth v. Mims*, No. 3094 Phila. 1997, at 9 (Pa. Super. Jan. 25, 1999) (unpublished memorandum). Therefore, we find that this claim is procedurally defaulted by operation of the independent and adequate state ground doctrine. *See Coleman*, 501 U.S. at 727-31. Because Petitioner has failed to establish cause and prejudice, or a miscarriage of justice, this claim must be denied.[37]

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36. We note that this constitutes a correct application of state procedural law. Under the PCRA, a petitioner must prove that he has not previously litigated his claim. *See* 42 Pa. Cons. Stat. Ann. § 9543(a)(3); *see also Commonwealth v. Christy*, 656 A.2d 877, 881 (Pa. 1995) (forbidding petitioner from obtaining PCRA review of claims previously litigated on direct appeal simply by advancing new legal theories).

37. In any event, this claim is also meritless for the reasons discussed *supra* at Part III.C.1. In particular, the prosecutor did not characterize any witness as good or bad based upon race or religion, nor did she raise the issue of religion during trial. Rather, it was the defense which raised the issue of Muslim names in order to defuse the issue of Petitioner's alias, and to strengthen his alibi through association with members of the Nation of Islam. *See Commonwealth*

(Cont'd)

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f. Emotional appeal

Finally, Petitioner argues that the prosecutor improperly appealed to the jurors' emotions during closing argument. Petitioner cites to the following statements made by the prosecutor during closing:

> The Commonwealth is unable to recreate, to bring the Dubrow's Furniture Store at 4th & South into this courtroom, so the Commonwealth will ask you to do this. The Commonwealth will ask you to . . . take yourselves on January 4, 1971, into Dubrow's Furniture Store. Walk through that door. Walk through with the people who appeared before you, what was left of those people who appeared before you, because Alton Barker can never appear before you.
>
> * * * *
>
> Now Audrey DiMeo, and I am sure, Audrey DiMeo, that she goes to bed at night just like everybody else does and I am sure that when she hears a creak anywhere around her house I am sure she gets a little bit nervous.

(Cont'd)

v. Mims, No. 332 Phila. 1983, at 16-17 (Pa. Super. Dec. 14, 1984) (unpublished memorandum). Since the jury had heard testimony regarding the co-defendants' religious affiliation, including reasons for the abandonment of surnames by converts to Islam, the prosecutor's comments regarding the decision of the Barkers not to change their names cannot be said to have prejudiced the jury or to have denied Petitioner a fair trial.

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* * * *

> Walk toward [the defendants] just like Mr. Gruby walked toward them . . . Tell [them] whether that fooled you at all. Tell both of these defendants, and by your telling both of them tell Alton Barker, tell his widow here in the courtroom . . . Tell it to Alton Barker.

(N.T. 11/19/81, 19.133, 19.158-159, 19.174-176). Defense counsel did not object to these statements at trial. On direct appeal, Petitioner relied upon a different statement made by the prosecutor to support a claim that she improperly elicited the jury's sympathy during closing. The Superior Court found the claim to be meritless. *Commonwealth v. Mims*, No. 332 Phila. 1983, at 28 (Pa. Super. Dec. 14, 1984) (unpublished memorandum). On collateral appeal, Petitioner cited both state and federal law in support of a claim that the prosecutor improperly appealed to emotion. In response, the Superior Court stated:

> [Petitioner] also contends the prosecutor improperly appealed to religious and racial prejudice [during closing] by making reference to the Muslim religion, . . . and attempting to elicit sympathy for the victims. These claims were addressed by this Court on direct appeal; therefore, they cannot serve as a basis for PCRA relief, having been previously litigated and found to be meritless.

Commonwealth v. Mims, No. 3094 Phila. 1997, at 9 (Pa. Super. Jan. 25, 1999) (unpublished memorandum). Accordingly, we find that this claim is procedurally defaulted

by operation of the independent and adequate state ground doctrine.[38] *See Coleman*, 501 U.S. at 727-31. Again, because Petitioner has failed to establish cause and prejudice, or a miscarriage of justice, this claim must be denied.

D. Ineffective Assistance Of Counsel

In "Ground Four," Petitioner argues that retrial counsel failed to properly preserve and raise numerous meritorious issues at retrial and on appeal, thereby violating Petitioner's right to effective assistance of counsel. Respondents argue

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38. Even if we were to reach the merits of this claim, we find it to be meritless. In order to determine whether these remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process," this Court is guided by the factors enunciated by the United States Supreme Court in *Darden*, *supra*: (1) whether the prosecutor manipulated or misstated the evidence; (2) whether the comments implicated other specific rights; (3) whether the comments were invited by or responsive to defense counsel's summation; (4) whether the trial court's instructions ameliorated the hann; (5) whether the evidence weighed heavily against the defendant; and (6) whether the defendant had an opportunity to rebut the prosecutor's comments. *See* 477 U.S. at 181-182. Here, the prosecutor merely reviewed the testimony of the witnesses and did not mischaracterize the evidence. Although no basis exists on the face of the record to support the prosecutor's statement that Ms. DiMeo gets nervous when she hears a creak in her house, this comment cannot be said to have infected the trial with unfairness, particularly in the context of a lengthy trial involving a particularly brutal crime. Moreover, both the prosecutor and the court repeatedly called upon the jury to decide the case on the evidence and nothing else. Thus, although the comments made by the prosecutor could have the effect of eliciting emotion, they did not rise to the level of a constitutional violation.

that most of Petitioner's ineffectiveness claims are procedurally defaulted and that, in any event, the claims are meritless.

Claims of ineffective assistance of counsel are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). *See Williams*, 529 U.S. at 391 (stating "[i]t is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States'"). In *Strickland*, the United States Supreme Court set forth the standard for a petitioner seeking habeas relief on the grounds of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id., 466 U.S. at 687. Since "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," a court must be "highly deferential" to counsel's performance and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

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Trial counsel is afforded a wide range within which to make decisions without fear of judicial second-guessing. *Buehl v. Vaughn*, 166 F.3d 163, 169 (3d Cir. 1999) (citing *United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989)). The Third Circuit has cautioned that it is "only the rare claim of ineffectiveness of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance." *Id.* When bringing an ineffective assistance of trial counsel claim, the petitioner must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

The *Strickland* test also applies to claims of ineffective assistance of appellate counsel. Petitioner is first required to show that appellate counsel's failure to raise the abovementioned argument on appeal fell outside "the wide range of reasonable professional assistance; that is, [Petitioner would have to] overcome the presumption that, under the circumstances, the challenged action 'might be considered sound [appellate] strategy.'" *Buehl*, 166 F.3d at 173 (3d Cir. 1999) (citing *Strickland*, 466 U.S. at 689); *see Smith v. Murray*, 477 U.S. 527, 536 (1986) (stating that the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of appellate advocacy") (quoting *Jones v. Barnes*, 463 U.S. 745, 751-752 (1983)). After overcoming the presumption of reasonableness, Petitioner must then show that the deficient representation of appellate counsel prejudiced him. *Id.*

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1. Standard Applied By The Superior Court

Petitioner first argues that the Superior Court applied "an overly stringent prejudice standard" when it reviewed Petitioner's claims of ineffective assistance of counsel, and therefore erred in finding none. In discussing Petitioner's ineffectiveness claims on collateral review, the Superior Court cited *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1986), which is the Pennsylvania equivalent of *Strickland*, *supra*. Under Pierce, the prejudice standard applicable to claims of ineffectiveness of counsel is whether there was a "reasonable probability that had the [error] not been made, the result would have been different." 527 A.2d at 977. In its memorandum opinion, the Superior Court abbreviated this inquiry as whether "because of such act or omission, the petitioner suffered prejudice to the extent [that] the outcome of the proceedings would have been different but for counsel's ineffectiveness." *Commonwealth v. Mims*, No. 3094 Phila. 1997, at 4 (Pa. Super. Jan. 25, 1999) (memorandum opinion). Although the Superior Court left out the "reasonable probability" language from *Pierce* in its brief summary of the law, the court correctly cited *Pierce* as its sole binding precedent. Since there is no indication that the Superior Court misapplied the Pierce standard in its analysis, we find that the state court neither contradicted nor misapplied United States Supreme Court precedent.[39]

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39. In any event, as discussed *infra*, we find that the results reached by the Superior Court regarding effectiveness of counsel do not contradict or misapply Supreme Court precedent. *See Hollman v. Wilson*, 158 F.3d 177, 180 n.3 (3d Cir. 1998) (stating that although the state court based its decision on an erroneous view of applicable

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See Werts, 228 F.3d 178, 203 (3d Cir. 2000) (noting Pennsylvania standard judging ineffectiveness claims in *Pierce* is identical to the ineffectiveness standard enunciated by the United States Supreme Court in *Strickland*).

2. Ineffective Assistance Of Counsel For Failing To Preserve And Raise Issues Related To The Retrial Court's Preclusion Of Testimony Concerning The Reliability Of The Two (2) Commonwealth Identification Witnesses

Petitioner first broadly claims that counsel was ineffective for failing to preserve and raise issues related to the retrial court's preclusion of testimony concerning the reliability of the Commonwealth's two (2) identification witnesses, DiMeo and Gruby.[40] Respondents counter that, in the alternative, Petitioner's ineffectiveness claims are

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law, "the particulars of the reasoning do not affect our ruling because we hold that, in any event, the state court adjudication did not result in a decision that was contrary to, or an unreasonable application of, clearly established federal law").

40. Petitioner also argues that counsel was ineffective for merely objecting to Judge Sabo's ruling that Petitioner could introduce Gruby's initial mis-identification of Petitioner at the first trial only in exchange for the Commonwealth being permitted to introduce Gruby's subsequent identification. *See* Pet'r Br. at 18. Petitioner has never presented this claim to the state courts, and in any event did not develop the claim here. Therefore, we find this ineffectiveness claim to be unexhausted and defaulted. *Gray*, 518 U.S. at 161-162; *Banks*, 126 F.3d at 211; *Commonwealth v. Fahy*, 737 A.2d 214, 218 (Pa. 1999).

impermissibly broad and vague, procedurally defaulted, and meritless.

Petitioner did not allege ineffectiveness of counsel on direct appeal. In his PCRA petition, Petitioner specified only one (1) instance of alleged ineffectiveness — retrial counsel's failure to cross-examine DiMeo regarding her sequestration violation at the first trial.[41] *See* Pet'r PCRA Pet. at 6, Pet'r PCRA Br. at 4-5. In his appeal from the denial of PCRA relief, Petitioner re-framed the ineffectiveness claim using the broadest possible language, alleging that retrial counsel was ineffective "At Every Stage Of The Proceedings." *See* Pet'r Sup. Ct. Br. at 4, 14-17. Petitioner failed to specify any alleged instance of ineffectiveness in his "statement of questions involved" presented to the Pennsylvania Superior Court, and did not refer to any specific instance of alleged ineffectiveness in his brief to the Pennsylvania Superior Court.[42]

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41. Petitioner explains that ineffectiveness of retrial counsel was not raised on direct appeal because the same attorney — Louis Lipschitz, Esquire — represented Petitioner for purposes of the retrial, post trial motions and direct appeal. As a result, ineffectiveness of retrial counsel was first raised by petitioner's present counsel, Leonard Sosnov, Esquire, on collateral appeal. *See* Pet'r Traverse at 10-11.

42. In discussing Petitioner's ineffectiveness claims, the Superior Court first noted that, under Pennsylvania law, an issue found to be meritless may not be re-litigated under the guise of ineffective assistance of counsel. *Commonwealth v. Mims*, No. 3094 Phila. 1997, at 4 (Pa. Super. Jan. 25, 1999) (memorandum opinion). (citing *Commonwealth v. DeHart*, 650 A.2d 38 (Pa. 1994)).

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In the instant habeas petition, Petitioner attaches an ineffectiveness claim to every issue and sub-issue raised, thereby claiming that former counsel was ineffective for everything he did and did not do at every stage of the proceedings. Under *Strickland*, Petitioner bears the burden of identifying specific acts or omissions of counsel which constituted deficient representation, and which resulted in prejudice, in order to overcome "the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 687-689. "[B]ald assertions and conclusory allegations do not provide sufficient ground" for habeas relief. *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 301 (3d Cir. 1991). We conclude that the majority of Petitioner's ineffectiveness claims are overly broad and impermissibly vague, and that in any event the claims were either not raised or not fairly presented to the state courts. Therefore, we find Petitioner's ineffectiveness claims related to the retrial court's preclusion of testimony

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The Superior Court then discussed two (2) variants of Petitioner's ineffectiveness claim — that retrial counsel was ineffective for failing to cross-examine DiMeo regarding her sequestration violation, and for failing to present testimony to discredit Gruby's identification. The Superior Court found both claims meritless under the prejudice prong of the *Pierce* test for ineffectiveness of counsel, noting that both witnesses had previously identified Petitioner from photos. *Id.* at 4-7. Interestingly, Petitioner conceded the reasonableness of counsel's decision not to cross-examine DiMeo about the sequestration incident because such questioning "would very likely have been futile given her testimony in 1975 that nothing suggestive happened in the hallway [encounter.]" *See* Pet'r PCRA Sup. Ct. Br. at 24.

concerning the reliability of Commonwealth identification witnesses DiMeo and Gruby to be procedurally defaulted.[43]

Even if this court were to reach the merits of Petitioner's ineffectiveness claims, however, we would find them to be meritless. As discussed *supra* in Part III.A, this court finds

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43. The only ineffectiveness claim arguably presented by Petitioner in his habeas petition *and* addressed on the merits by the state courts was former counsel's failure to present the testimony of O'Connor in order to discredit Gruby's identification testimony. As to this claim, the Superior Court stated:

> [Petitioner] argues defense counsel should have presented the testimony of the other individual Mr. Gruby first picked at the line-up, demonstrating how dissimilar his appearance was from [Petitioner] and discrediting Mr. Gruby's identification of [Petitioner.] [Petitioner], however, failed to demonstrate the result at his second trial would have differed had this person been permitted to testify. We cannot speculate on such dissimilarities any more than we can speculate on the resemblance of this person to any of the other seven robbers. [Petitioner] fails to prove prejudice, particularly in light of Ms. DiMeo's positive identification and both witnesses prior identifications of [Petitioner.] Therefore, [Petitioner] is not entitled to relief on this claim. *Id.* [*Commonwealth v. Paolello*, 665 A.2d 439.]

Commonwealth v. Mims, No. 3094 Phila. 1997, at 6-7 (Pa. Super. Jan. 25, 1999) (memorandum opinion). Since there is no apparent error in the state court's analysis, and since the prejudice prong of the state test for ineffectiveness is identical to that set forth in *Strickland*, we find that the decision of the state court is not "contrary to," nor an unreasonable application of, clearly established federal law. *Williams*, 529 U.S. at 386-389.

Petitioner's claims regarding the retrial court's refusal to allow testimony concerning the reliability of the Commonwealth's two (2) identification witnesses to be meritless. Trial counsel cannot be deemed to have been deficient for failing to preserve meritless claims, nor can a petitioner show prejudice under the circumstances. *See Strickland*, 466 U.S. at 687-688. Moreover, appellate counsel cannot be deemed ineffective for failing to preserve a meritless issue for appellate review. *Buehl*, 166 F.3d at 173 (citing *Strickland*, 466 U.S. at 689); *Williams v. Born*, 2000 WL 1207165, at *8 (E.D. Pa. Aug. 23, 2000) (denying petitioner's claim that counsel was ineffective for failing to properly present claims on appeal). Therefore, Petitioner is not entitled to habeas relief for ineffectiveness claims related to the retrial court's preclusion of testimony concerning the reliability of the Commonwealth's identification witnesses.

3. Ineffective Assistance Of Counsel For Failing To Preserve And Raise Issues Relating To Alleged Prosecutorial Misconduct

Petitioner next broadly claims that counsel was ineffective for failing to preserve and raise issues relating to alleged prosecutorial misconduct during the retrial. As with Petitioner's other ineffectiveness claims, Respondents counter that the claims are impermissibly broad and vague, procedurally defaulted, and, in the alternative, meritless.

Petitioner did not raise any aspect of this blanket ineffectiveness claim on direct appeal. On collateral appeal, Petitioner raised this issue as a blanket ineffectiveness claim — and then did not develop the claim in his supporting

memorandum. In addressing the underlying claims of prosecutorial misconduct, the Pennsylvania Superior Court observed that "Appellant cannot raise previously litigated claims under the guise of an ineffectiveness claim.[44] *Commonwealth v. Mims*, No. 3094 Phila. 1997, at 9 (Pa. Super. Jan. 25, 1999) (unpublished memorandum). Petitioner recognized the previously litigated nature of this ineffectiveness claim in his *allocatur* petition to the Pennsylvania Supreme Court, wherein he admitted that "this claim may be considered previously litigated." Petr's Pet for Alloc. at 25. For these reasons, we find that this claim to be procedurally defaulted.[45] *See Coleman*, 501 U.S. at 727-31.

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44. In addressing Petitioner's claim that the prosecutor engaged in misconduct by referring to various evidence at trial, the Superior Court stated that "Appellant's argument is essentially an attack on the admissibility of this evidence, not on the prosecutor's reference to it. A claim of counsel's ineffectiveness for failing to object to alleged misconduct does not encompass a challenge to the evidentiary rulings of the trial court." *Commonwealth v. Mims*, No. 3094 Phila. 1997, at 7-8 (Pa. Super. Jan. 25, 1999) (unpublished memorandum). Similarly, in addressing Petitioner's claims related to prosecutorial misconduct during closing argument, the Superior Court first found no misconduct on the part of the prosecutor, and then stated: "Again, the claim [that] counsel was ineffective for failing to object to the prosecutor's statement [during closing] is really an attempt to assail an evidentiary ruling, and we will not review it under the guise of a PCRA ineffectiveness claim." *Id.* at 8-9. Thus, even if we were to find that Petitioner fairly presented these ineffectiveness claims to the state courts, the claims were deemed previously litigated and would therefore be procedurally defaulted. *See Coleman*, 501 U.S. at 727-31.

45. We further note that Petitioner failed to state this ineffectiveness claim with requisite specificity. For example,

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Because Petitioner has failed to establish cause and prejudice, or a miscarriage of justice, this claim must be denied.

Petitioner would not be entitled to habeas relief even if we reached the merits of the ineffectiveness claims related to alleged prosecutorial misconduct. As discussed *supra* in Part III.C, this court finds Petitioner's claims of prosecutorial misconduct to be meritless. As a result, trial counsel cannot be deemed to have been deficient for failing to preserve meritless claims, nor can appellate counsel be deemed ineffective for failing to preserve a meritless issue for appellate review. *Strickland*, 466 U.S. at 687-689; *Buehl*, 166 F.3d at 173. Therefore, Petitioner is not entitled to habeas relief for ineffectiveness claims related to alleged prosecutorial misconduct.

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Petitioner asserts that although former counsel preserved "some" of the variants of this misconduct claim, he may have done so "only on state law grounds." *See* Pet'r Br. at 40. Petitioner further asserts that "if former counsel is found to have waived at trial or on direct appeal at least some of [these] issues, which is likely, it is clear that former counsel was constitutionally ineffective. . . ." *Id.* at 40 n.24. Also, Petitioner vaguely states that former counsel "may have preserved some of the issues concerning the improper prejudicial stigmatizing of [P]etitioner." *See id.* at 41. Petitioner does not further specify how counsel was allegedly ineffective. In any event, as discussed *infra*, former counsel cannot be deemed ineffective for failing to raise or preserve claims related to alleged prosecutorial misconduct because we have found that the underlying claims are meritless.

4. Ineffective Assistance Of Counsel For Failing To Press A *Batson* Claim

In his final ineffectiveness claim, Petitioner argues that prior counsel was ineffective for failing to press a *Batson* claim in the Pennsylvania Supreme Court and on *certiorari* to the United States Supreme Court. Petitioner does not dispute that at the time of his retrial in 1981, the applicable standard for Equal Protection claims was set forth in *Swain v. Alabama*, 380 U.S. 202 (1965).[46] In addition, Petitioner credits prior counsel with anticipating *Batson* and preserving it "at every step" of the Pennsylvania proceedings, including the filing of a twenty-six (36) page supplemental brief with the Pennsylvania Superior Court in which he pointed out which courts had already adopted what was to become the *Batson* standard, and urging the Superior Court to do

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46. Under *Swain*, a petitioner was required to show a pattern and practice of racial discrimination in jury selection across multiple prosecutions. 380 U.S. at 223-224. On April 30, 1986 — seven (7) months *after* the Pennsylvania Supreme Court denied *allocatur* in Petitioner's case — the United States Supreme Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986). Under *Batson*, a petitioner alleging discrimination "must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike." 476 U.S. at 97. If the petitioner makes a prima facie showing, the burden then shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question, and the court must then determine whether the petitioner met his burden of proving purposeful discrimination. *Id.* at 97-98. Here, the Pennsylvania Superior Court properly applied the then-prevailing law of *Swain* and found no Equal Protection violation. Moreover, *Batson* was not given retroactive effect. *See Allen v. Hardy*, 478 U.S. 255 (1986).

likewise. *See* Petr.'s Br. at 45. Nevertheless, Petitioner argues that counsel was ineffective because: (1) he only included one (1) sentence about *Batson* in his brief to the Pennsylvania Supreme Court; (2) he failed to notify the Pennsylvania Supreme Court that the United States Supreme Court had granted *certiorari* in *Batson*; and (3) he failed to file a *certiorari* petition from the Pennsylvania Supreme Court's subsequent denial of *allocatur*. We find this ineffectiveness claim to be meritless.

As a preliminary matter, we note that there is no constitutional right to counsel after the first appeal as of right. According to the United States Supreme Court, "[a] first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). However, considerations governing a discretionary appeal are different because "the right to effective assistance of counsel is dependent on the right to counsel itself," and there is no constitutional right to counsel on discretionary appeal. *Id.* at 396-397 n.7 (citing *Wainwright v. Toma*, 455 U.S. 586, 587-588 (1982) (*per curiam*); *see also Coleman*, 501 U.S. at 756-757 ("[A] criminal defendant has no right to counsel beyond his first appeal"); *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (the constitutional right to counsel is guaranteed both for trial and for the first appeal as of right, and no further). Here, Petitioner acknowledges the effectiveness of counsel with regard to the *Batson* issue on appeal to the Pennsylvania Superior Court, which was Petitioner's first appeal as of right. Since Petitioner had no right to effective assistance of counsel beyond this stage of appellate review, Petitioner's claim that counsel was

ineffective for failing to press the Pennsylvania Supreme Court to anticipate the *Batson* standard, or for failing to seek *certiorari* to the United States Supreme Court, must be denied.

In any event, as explained *supra*, counsel has no duty to raise every possible meritorious issue on appeal. *Smith*, 477 U.S. at 536; *see also Buehl*, 166 F.3d at 173-174 (stating "[o]ne element of effective appellate strategy is the exercise of reasonable selectivity in deciding which arguments to raise"); *Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3d Cir. 1996) (stating "it is a well established principle that counsel decides which issues to pursue on appeal . . . and there is no duty to raise every possible claim"). In *Sistrunk*, which also arose from this consolidated retrial, the Third Circuit declined to second guess appellate counsel's decision not to press adoption of the *Batson* standard on appeal. The Third Circuit explained:

> There is every reason to believe that [Sistrunk's] appellate counsel made an informed judgment call that was counsel's to make. Even if the record did not provide this affirmative assurance, however, we would be required to so assume unless [Sistrunk] has come forward with evidence to the contrary sufficiently probative to overcome the 'strong presumption' required by Strickland. We conclude that he has not.

Sistrunk, 96 F.3d at 671. Specifically, the Third Circuit found that Sistrunk failed to call his appellate counsel as a witness at his state PCRA evidentiary hearing, and that there was little other evidence to support Sistrunk's claim of

ineffectiveness. *Id.* Here, Petitioner chose not to have a PCRA hearing. Instead, Petitioner submitted as evidence the PCRA transcript of his co-defendant, Sistrunk — the identical transcript which the *Sistrunk* court found to be insufficient in Sistrunk's own case.[47]

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47. Petitioner also submitted the affidavits of three (3) appellate advocates who opined that Petitioner's counsel had acted ineffectively in not pressing the Pennsylvania Supreme Court to adopt the *Batson* standard. Because these advocates had nothing to do with this case, and were not privy to counsel's decisionmaking as to what claims to pursue on appeal, we find that the affidavits are insufficient to overcome the strong presumption of effectiveness set forth in *Strickland*. *See* 466 U.S. at 689.

In addition, we find Petitioner's reliance on *Government of Virgin Island v. Forte*, 865 F.2d 59 (3d Cir. 1989) to be misplaced. Although *Forte* also involved counsel's failure to press a *Batson* claim, the case is distinguishable. At the time of jury selection in *Forte*, the United States Supreme Court had already granted *certiorari* in *Batson*. Both the defendant and co-defense counsel in *Forte* had expressly called trial counsel's attention to the *Batson* issue; they had anticipated that the prosecution would exercise peremptory challenges on the basis of race; and they had decided that it would be in the defendant's best interest to raise a *Batson* type claim. Most importantly, trial counsel admitted that this agreed upon strategy was abandoned because of "personal embarrassment," which the Third Circuit characterized as a reason wholly unrelated to professional judgment, trial strategy, or the defendant's best interest. *See* 865 F.2d at 61-63. Moreover, the *Forte* court cautioned that its decision "should not be broadly read." *Id.* at 63; *see also Sistrunk*, 96 F.3d at 673 ("[*Forte*] should not be read to encompass a case . . . where the petitioner has offered no substantial reason to believe that the challenged decision of counsel was not the product of a professional judgment").

In addition, "[t]here is no general duty on the part of defense counsel to anticipate changes in the law." *Sistrunk*, 96 F.3d at 670 (quoting *Government of the Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989)); see also *Commonwealth v. Garnett*, 613 A.2d 569, 573 (Pa. Super. 1992) (stating, under state law, counsel cannot be held ineffective for failing to predict future law). In *Sistrunk*, as here, the petitioner argued that "counsel should have realized that the governing law might change and, accordingly, should have preserved the issue for as long as possible." 96 F.3d at 672. While acknowledging that some defense lawyers predicted the adoption of the *Batson* standard, the Third Circuit concluded: "we decline to hold that the performance of petitioner's appellate counsel was constitutionally deficient because she did not find the likelihood of that eventuality sufficient to alter her appellate advocacy strategy."[48] *Id.* Therefore, we find that counsel did not perform deficiently in deciding not to press a Batson claim.[49]

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48. The *Sistrunk* court, citing cases from three (3) other circuits, stated that "every court that has addressed the issue under similar circumstances has held that the failure to anticipate the result in *Batson* did not constitute ineffective assistance." 96 F.3d at 672. Notably, the court in *Sistrunk* reached its conclusion even though *Batson* was decided while Sistrunk's petition for *allocatur* was pending before the Pennsylvania Supreme Court, and even though Sistrunk had written a letter to counsel explicitly requesting that the *Batson* issue be pursued. Here, Petitioner's petition for *allocatur* was denied seven (7) months *before Batson* was decided, and there is no evidence that Petitioner instructed his counsel to pursue a *Batson* claim.

49. Since we have concluded that counsel's performance was not shown to be deficient, we need not determine whether Petitioner

(Cont'd)

For all of the above reasons, we find that the determination of the state courts is not "contrary to" the conclusions reached by the Supreme Court in *Strickland*, supra, governing claims of ineffective assistance of counsel. *See Williams*, 529 U.S. at 386-389. Moreover, we find that the rationale of the state courts does not constitute an "unreasonable application" of clearly established federal law. *See id.*; *Hameen*, 212 F.2d at 246. Therefore, habeas relief is not appropriate for this claim.

Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 12th day of April, 2001, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be DENIED. There has been *no* substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability.

s/ Peter B. Scuderi
PETER B. SCUDERI
UNITED STATES MAGISTRATE JUDGE

(Cont'd)
was prejudiced by counsel's decision. *See Strickland*, 466 U.S. at 697 (stating "there is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one").

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED MARCH 5, 2003

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-3349

ROBERT MIMS a/k/a AMEEN JABBAR,

v.

DAVID CRIST, WARDEN; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Robert Mims,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 00-cv-02655)

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge*,
SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH,
MCKEE, RENDELL, BARRY, AMBRO, FUENTES
and SMITH, *Circuit Judges*

Appendix D

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, an no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered

By the Court,

s/ [illegible]
United States Circuit Judge

DATE: MAR 05 2003